

United States  
Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Appellant.

OLIVIA WAGNER, as Administratrix with the  
Will Annexed of the Estate of Nick Wagner,  
Deceased,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 432

Upon Appeal from the District Court of the  
United States for the District of Montana.

FILED

JUL 25 1935

PAUL P. O'BRIEN,



No. 7876

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Circuit Court of Appeals

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## INDEX.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer .....	29
Application for Order Reviving and Continuing Case in Name of Olivia Wagner, as Administratrix, etc. ....	852
Assignment of Errors.....	860
Attorneys, Names and Addresses.....	1
Bill of Exceptions.....	46
Deposition for Defendant:	
Darling, William L.	
—direct .....	705
—cross .....	711
Witnesses for Defendant:	
Baer, Edward Sherman	
—direct .....	500
—cross .....	502
—redirect .....	504
—recross .....	505

	Index	Page
Witnesses for Defendant (cont.):		
Blum, Bernard		
—direct .....		526
—cross .....		530
—recalled, direct .....		687
cross .....		688
redirect .....		690
recross .....		690
redirect .....		696
Brophy, John B.		
—direct .....		387
—cross .....		392
—redirect .....		395
Bryson, L. B.		
—direct .....		341
—cross .....		343
—redirect .....		344
Burke, Joe		
—direct .....		418
—cross .....		425
—redirect .....		431
—recross .....		432
—redirect .....		432
Bushell, T. J.		
—direct .....		715
—cross .....		718
—redirect .....		721
Carlson, Sam		
—direct .....		636

Index	Page
Witnesses for Defendant (cont.):	
Clements, M. F.	
—direct .....	571
—cross .....	603
—redirect .....	632
—recross .....	635
Combes, W. M.	
—direct .....	517
—cross .....	522
Cullen, J. D.	
—direct .....	496
—cross .....	497
—redirect .....	499
—recross .....	500
Dennis, Dwight	
—rebuttal, direct .....	752
cross .....	755
redirect .....	759
recross .....	759
Derrig, J. T.	
—direct .....	540
—cross .....	546
—redirect .....	548
Edighoffer, (Mrs.) Mary	
—direct .....	442
—cross .....	448
Efta, John	
—direct .....	368
—cross .....	372
—recalled, cross .....	412

Index	Page
Witnesses for Defendant (cont.):	
Eiden, H. W.	
—rebuttal, direct .....	781
cross .....	784
redirect .....	784
Graham, (Mrs.) Ellen	
—direct .....	721
Hayes, Mrs.	
—direct .....	746
—cross .....	749
Holstein, Charles C.	
—direct .....	378
—cross .....	380
—redirect .....	381
—recross .....	382
Jobe, Oswald	
—direct .....	723
—cross .....	727
Jones, (Miss) Edith	
—direct .....	460
—cross .....	470
Kimball, Arthur	
—direct .....	728
—cross .....	729
—redirect .....	733
—recross .....	734

Index	Page
Witnesses for Defendant (cont.):	
Lillis, B. C.	
—direct .....	644
—cross .....	653
—redirect .....	680
—recross .....	684
—redirect .....	685
—recross .....	685
—surrebuttal, direct .....	797
cross .....	798
redirect .....	799
recross .....	799
Linn, James	
—direct .....	382
—cross .....	385
—redirect .....	387
Lund, Charles M.	
—direct .....	355
—cross .....	358
—redirect .....	361
—recross .....	362
—redirect .....	362
—recross .....	362
—redirect .....	363
Miesoloski, Frank	
—direct .....	396
—cross .....	405
—redirect .....	409
—recalled, redirect .....	495
recross .....	495

Index	Page
Witnesses for Defendant (cont.):	
Moline, August W.	
—direct .....	350
—cross .....	352
Murray, Samuel	
—direct .....	697
—cross .....	699
—redirect .....	702
Nelson, Charles O.	
—rebuttal, direct .....	760
cross .....	761
redirect .....	762
Oien, John	
—direct .....	549
—cross .....	553
—cross .....	562
—redirect .....	569
—recross .....	570
—redirect .....	571
—recross .....	571
—recalled, redirect .....	703
Ostby, M. P.	
—rebuttal, direct .....	774
cross .....	775
redirect .....	776
recross .....	777
Palen, H. W.	
—rebuttal, direct .....	778
cross .....	780



	Index	Page
Witnesses for Defendant (cont.):		
Parker, Eugene		
rebuttal, direct .....		771
cross .....		773
Paulson, Andrew		
—direct .....		511
—cross .....		514
—redirect .....		516
—recross .....		516
Pierce, W. E.		
—direct .....		414
—cross .....		416
—redirect .....		417
—recross .....		418
Rehbein, August		
—direct .....		638
Rowe, Carl		
—direct .....		749
—cross .....		752
Rush, Tom		
—direct .....		432
—cross .....		435
—redirect .....		440
Shea, J. M.		
—direct .....		363
—cross .....		365
—redirect .....		368



Index	Page
Witnesses for Defendant (cont.):	
Sletten, Tom	
—rebuttal, direct .....	763
cross .....	764
—rebuttal, recalled, direct .....	777
Sloan, W. C.	
—direct .....	534
—cross .....	536
—redirect .....	538
—recross .....	539
Stark, Earl W.	
—direct .....	345
—cross .....	347
—redirect .....	350
Stark, James C.	
—direct .....	506
—cross .....	509
White, Wesley	
—rebuttal, direct .....	766
cross .....	769
Woodard, Charles M.	
—direct .....	734
—cross .....	743
—redirect .....	745
—recross .....	745
Zinda, Anselin	
—direct .....	639
—cross .....	642

Index	Page
Witnesses for Plaintiff:	
Bailey, John	
—direct .....	233
—cross .....	236
Barclay, Arthur	
—direct .....	126
—cross .....	133
Coyne, Mrs. Patrick	
—direct .....	194
—rebuttal, direct .....	770
cross .....	771
redirect .....	771
Cullen, J. D.	
—direct .....	201
—cross .....	204
—redirect .....	207
—recross .....	209
Drake, O. S.	
—direct .....	85
—cross .....	97
Howard, W. C.	
—direct .....	224
—cross .....	228
Kinney, J. C.	
—direct .....	241
—cross .....	248
—redirect .....	253
—recross .....	256
—redirect .....	257
—recross .....	257

	Index	Page
Witnesses for Plaintiff (cont.):		
Lehin, Tom		
—direct .....		260
—cross .....		262
—redirect .....		263
—recross .....		263
Lentz, William		
—direct .....		148
—cross .....		151
Lyman, R. A.		
—direct .....		264
—recalled, direct .....		274
direct .....		296
cross .....		303
redirect .....		327
recross .....		336
redirect .....		338
—rebuttal, direct .....		785
cross .....		788
redirect .....		791
recross .....		793
redirect .....		796
Manning, William E.		
—direct .....		209
—cross .....		211
—redirect .....		211
—recross .....		212

Index	Page
Witnesses for Plaintiff (cont.):	
Massey, R. V.	
—direct .....	135
—cross .....	141
—redirect .....	145
—recross .....	146
Oien, John	
—direct .....	270
—cross .....	273
—recalled, direct .....	290
cross .....	295
redirect .....	296
O'Keefe, Mrs. Frank	
—direct .....	71
—cross .....	76
—redirect .....	77
—recross .....	78
—redirect .....	79
—recross .....	79
Orgain, K. M.	
—direct .....	212
—cross .....	222
Pickering, Albert	
—direct .....	47
—cross .....	58
—redirect .....	65
Presthus, John	
—direct .....	258

Index	Page
Witnesses for Plaintiff (cont.):	
Rife, S. P.	
—direct .....	116
—cross .....	124
—redirect .....	125
—recross .....	126
Sherman, Ed.	
—direct .....	79
—cross .....	83
Sutherland, Dan	
—direct .....	154
—cross .....	165
Sutherland, Mrs. Dan	
—direct .....	232
Wagner, Nick	
—direct .....	171
—cross .....	181
—recalled, redirect .....	196
recross .....	199
cross .....	340
Wagner, Olivia	
—direct .....	200
—cross .....	200
—recalled, direct .....	339
Webber, Edwin	
—direct .....	231
Webber, Jean	
—direct .....	66
—cross .....	70

Index	Page
Witnesses for Plaintiff (cont.):	
White, Charles E.	
—direct .....	103
—cross .....	110
—redirect .....	116
Charge to the Jury.....	801
Defendant's Motion for Directed Verdict..	799
Judge's Certificate .....	824
Orders Granting Additional Time.....	822
Verdict .....	821
Bill of Exceptions No. 2, (on order denying motion for new trial).....	837
Bond on Appeal.....	871
Caption .....	1
Certificate of Judge to Bill of Exceptions.....	851
Citation .....	873
Clerk's Certificate to Transcript of Record.....	879
Complaint .....	2
Judgment .....	44
Motion to Remand and Affidavits.....	18
Notice of Intention to File Petition for Removal .....	16
Order Allowing Appeal.....	870
Order Denying Motion for New Trial.....	836
Order Denying Motion to Remand.....	29
Order of Removal to Federal Court.....	17



Index	Page
Order Reviving Case in Name of Olivia Wagner, as Administratrix, etc.....	858
Petition for Appeal.....	869
Petition for New Trial.....	825
Petition for Removal to Federal Court.....	9
Praecipe (Defendant's) for Transcript of Record .....	875
Praecipe (Plaintiff's) for Additional Transcript .....	877
Reply .....	40
Verdict .....	43



NAMES AND ADDRESSES OF ATTORNEYS  
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Mr. H. LOWNDES MAURY,  
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Mr. THOMAS C. COLTON,  
Wibaux, Montana.

Attorneys for Plaintiff and Appellee. [1\*]

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In the District Court of the United States in and  
for the District of Montana.

No. 566.

OLIVIA WAGNER, as Administratrix with the  
Will annexed of the Estate of NICK WAG-  
NER, deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation,

Defendant.

BE IT REMEMBERED, that the Transcript of  
Removal in this case, under the title of Nick Wag-

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\*Page numbering appearing at the foot of page of original certified  
Transcript of Record.

ner vs. Northern Pacific Railway Company, was duly filed in this court on March 27th, 1931, being in the words and figures following, to wit: [2]

In the District Court of the Seventh Judicial District of the State of Montana, in and for the County of Wibaux.

NICK WAGNER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation, M. L. HARE and JOHN  
PRESTHUS,

Defendants.

### COMPLAINT.

Plaintiff complains and alleges:

#### I.

That at all times herein mentioned the defendant corporation was and now is a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, operating a railroad from Duluth, Minnesota, to Tacoma, Washington, through the Town of Wibaux, in Montana, crossing at about right angles in said Town of Wibaux for 30 years previous to June 7, 1929, Beaver Creek, a river flowing from South to North with a water shed of 720 square miles up stream from where the said

railroad crosses it in Wibaux, and a length of about 40 miles above said railroad, and all of said water shed above said railroad being for all said 30 years completely barren of trees (except a few cottonwoods and box elders averaging less than one to the acre) and being almost entirely barren of any obstructions to the free flow of water out of said water shed rapidly when it falls and said Beaver Creek at all such times having seventeen, or more, tributaries in the water shed, all with no obstructions to the fast flow of water from there to the main stream.

## II.

That the said Railroad on and for 10 years prior to June 7, 1929 crossed the Valley at Beaver Creek (in which the Town of Wibaux is situated now, for 20 years partly north of the said track and partly south of said track) on an embankment maintained by defendants [3] about 4000 feet long and about 15 feet high above the flood plane, i.e. the Valley level of said Beaver Creek where it is crossed by said railroad, said embankment being gradually less in height above said valley level or flood plane until it reaches the sides of said valley, the said Town of Wibaux and the properties of this Plaintiff, hereinafter described, being on the level of said valley and on said flood plane and safe from high water of said Beaver Creek except for the negligent construction and acts of the defendants as herein set out.

## III.

That at all times herein set out from June 1928 to June 7, 1929, as Plaintiff is informed and believes M. L. Hare was and now is Master of the road bed and ways of said defendant corporation for the portion crossing said Valley and with authority from said corporation to change any negligent or dangerous permanent construction. That such M. L. Hare is a citizen of Montana. That for 10 years before June 7, 1929, Plaintiff is informed and believes John Presthus was and now is a section foreman of the said defendant corporation over the section embracing that portion of the said corporation's road crossing Beaver Creek Valley and with power and authority from said Defendant corporation to change or remedy any negligent or dangerous permanent condition on said road bed, and he the said John Presthus at all times herein mentioned has been and now is a citizen of Montana, and this Plaintiff is a citizen of Montana.

## IV.

That in May and June of almost every year for 10 years previous to June 7, 1929, Beaver Creek, at other seasons a small harmless creek, rose to the knowledge of said defendants in its flow and volume to several thousand times its usual flow and would usually rise right to its flood plane, i.e. the valley level at Wibaux, Montana; that the defendants, if they had exercised reasonable prudence would have known and they did know that in all



human probability a flood of the size of the one hereinafter described as of June 7, 1929, would arise in the ordinary course of nature, would cover with a shallow harmless sheet of water the flood plane where the Town of Wibaux is situated and that if the flow of water over the flood plane were obstructed by the said embankment that water seven feet or more deep would [4] accumulate south of said track over the said flood plane and throughout the said Town of Wibaux having 612 people, and around the property of Plaintiff in said town.

#### V.

That in June 1921 a flood occurred and in other years floods have here occurred causing rise of water within six inches as high on defendants said embankment as that of June 7, 1929, and shortly after each of said floods the Town Council of Wibaux and the Commercial Club of the Town of Wibaux, a responsible civic body, both notified the defendants of the negligent and dangerous condition of the said embankment as hereinafter set out and of the insufficiency of openings in the same, for water on the flood plane to flow unobstructed, and these notices were given in ample time for the said defendants to have made safe said embankment and made sufficient apertures for the flow of the said water on the flood plane to avoid and prevent the damming up and accumulation of water which came on June 7, 1929, and which defendants should have expected and if they had acted as rea-

sonable persons would have expected and which they did expect.

## VI.

That the said defendants in spite of such notice for eight years prior to June 7, 1929, and on the said day had negligently failed to provide more than two small apertures through said embankment for the running of water of said river or creek in the channel and on the flood plane, and through the negligence of said defendants during all such time one of said openings was only about 75 feet wide at the bridge over the said Beaver Creek, and narrower than the channel thereof at low water, and the other was only about 25 feet wide, (and not intended for an aperture for water at all), and was a viaduct for the main street of Wibaux, Montana; that through the negligence of all the said defendants the aperture at the bridge was insufficient to permit the free flow of said water in a safe shallow sheet on the flood plane in ordinary seasonally recurring high water and because of such negligent conduct and negligent damming by defendants of these waters of Beaver Creek, always a natural water course, with said embankment without any sufficient openings to permit such expected high water to flow unobstructed, the said natural water course was choked at [5] the bridge as it would not have been had sufficient opening been left there for said waters, to-wit: Three times as long as what was made and left there by the said defendants and because of some or all of such neg-

ligent acts of defendants dirty, silty water accumulated to great depths, to-wit: Seven feet or more over, around and in all that part of Wibaux south of the said embankment, and this water running around westerly in great volume through the Town was blocked and dammed for about six hours by the embankment before it broke down, the said embankment on both sides of said viaduct and at the bridge and rushed out.

## VII.

By reason of said negligent acts of defendants, Plaintiff's property situated in Wibaux south of said embankment and said track was covered and flooded and saturated with and carried away by dirty, silty water in the manner and to the extent and loss and damage as follows, to-wit: Plaintiff owned and possessed a stock of mens and boys clothing and cloths and rubber goods and haberdashery situate in the said flood at the Northeast corner of Wibaux Street and First Avenue South in Wibaux Town, Wibaux County, Montana, of the value of more than Eighteen Thousand Dollars; that the said flood caught, soaked, carried away and caused to be forever lost, and permanently damaged and impaired and lessened in value the said stock to the amount of and detriment to Plaintiff of Fifteen Thousand Dollars, no part of which has ever been paid.

Wherefore Plaintiff demands judgment against defendants for the sum of Fifteen Thousand Dol-



lars and for interest thereon at eight per cent per annum from June 8th, 1929, until paid and for costs of suit.

H. L. MAURY

THOMAS C. COLTON

Attorneys for Plaintiff.

State of Montana

County of Wibaux—ss.

Nick Wagner being duly sworn on his oath does say: I am the Plaintiff in the foregoing complaint named; I have read the same, the same is true of my own knowledge except as to the matters stated on information and belief and as to such matters I believe it to be true.

NICK WAGNER

Subscribed and sworn to before me this 29th day of January, 1931.

[Seal]

THOMAS C. COLTON

Notary Public for the State of  
Montana, Residing at Wibaux,  
Montana.

My commission expires Dec. 30th, 1933. [6]

[Title of Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO  
FEDERAL COURT.

To the Honorable, the District Court of the Seventh  
Judicial District of the State of Montana, in  
and for the County of Wibaux.

The petition of Northern Pacific Railway Company, one of the defendants in said above-entitled cause, respectfully shows and represents:

1. That your petitioner is one of the defendants in said above-entitled action, which said action was commenced in said Court on the 5th day of February, 1931, by the said plaintiff and against your petitioner and its said co-defendants, M. L. Hare and John Presthus, and is now pending in said court, for the recovery of the sum of \$15,000.00 damages, with interest thereon from the 8th day of June, 1929, on account of the destruction of, and injury to, certain property belonging to said plaintiff, at Wibaux, Wibaux County, Montana, by reason of a flood caused by the alleged negligence of said defendants in the particulars charged in plaintiff's complaint.

2. That the grounds upon which the said plaintiff bases his right to recover said damages from said defendants, as set forth [7] in said complaint, are in substance that this petitioner's railroad, for ten years prior to the 7th day of June, 1929, crossed the valley of Beaver Creek, in which the town of Wibaux is situated, on an embankment

about 4000 feet long and about 15 feet high above the flood plane of said Beaver Creek, where it is crossed by said railroad. That in May and June of almost every year for ten years previous to June 7, 1929, said Beaver Creek, at other seasons a small harmless creek, rose to defendants' knowledge in its flow and volume to several thousand times its usual flow and would usually rise right to its flood plane at Wibaux, Montana. That in the exercise of reasonable prudence, defendants would have known and did know that in all human probability a flood of the size of June 7, 1929, would arise in the ordinary course of nature, would cover with water the flood plane where the town of Wibaux is situated, and if obstructed by said embankment, water seven feet or more deep would accumulate south of the railroad track and throughout said town of Wibaux, and around plaintiff's property. That defendants, shortly after each of said floods prior to 1929, were notified by the Town Council of Wibaux and the Wibaux Commercial Club of the negligent and dangerous condition of said embankment and the insufficiency of the openings therein for water on the flood plane to flow unobstructed, in ample time for defendants to make said embankment safe, and make sufficient openings for the flow of the water on the flood plane to avoid and prevent the damming up and accumulation of water on June 7, 1929. That in spite of such notice for eight years prior to June 7, 1929, and on said day, defendants failed to provide more than

two openings through said embankment, and through their negligence during all of said time, one of said openings was only 75 feet wide, and the other only 25 feet wide, and insufficient to furnish the free flow of said water in a safe, shallow sheet on the flood plane in ordinary seasonally recurring high water, because of which the natural water course of Beaver [8] Creek was choked at the bridge, which would not have occurred had sufficient openings been left there for said waters and accumulated dirty, silty water to a depth of seven (7) feet around and in all that part of Wibaux south of said embankment, and blocked by said embankment for about six (6) hours before it broke down.

With reference to your petitioner's company defendant M. L. Hare, it is alleged, on plaintiff's information and belief, that the said Hare from June, 1928, to June 7, 1929, was and still is Master of the Road bed and way of your petitioner for the portion crossing said valley, with authority from your petitioner to change any negligent or dangerous construction; and as to defendant John Presthus, it is alleged, on plaintiff's information and belief, that the said Presthus, for ten (10) years before June 7, 1929, was and still is a section foreman of your petitioner over the section embracing that part of your petitioner's railroad crossing Bear Creek valley, with power and authority from your petitioner to change or remedy any negligent or dangerous permanent condition on said road bed.



3. That your petitioner disputes said plaintiff's claim and denies any and all liability on account of the alleged destruction of, and injury to, his said property. That there is in said action a controversy wholly between citizens of different states which can be fully determined as between them, that is to say, between your petitioner, Northern Pacific Railway Company, and the said plaintiff, Nick Wagner. That at the time of the commencement of this action, the said plaintiff was, ever since has been and now is a resident and citizen of the State of Montana; that this petitioning defendant, at the time of the commencement of this action, was, ever since has been, and is now a corporation incorporated, organized and existing under the laws of the State of Wisconsin, and a citizen of said State of Wisconsin, and this petitioning defendant's said co-defendants, M. L. Hare and John Presthus, at the time of the commencement of this action were, ever since have been, and they are now residents and citizens of the State of Montana. [9]

4. That this action is of a civil nature and the matter and amount in dispute in said cause exceed, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

5. That there is in said action a separable controversy wholly between the said plaintiff and your petitioner, Northern Pacific Railway Company, as fully appears upon the face of said plaintiff's complaint herein. That no facts sufficient to constitute

a cause of action against your petitioner's said co-defendants, M. L. Hare and John Presthus, or either of them, are stated or set forth in said complaint; and aside from that neither the said M. L. Hare, nor the said John Presthus had any right, power or authority to make any changes, alterations or openings in said embankment or any part thereof, all of which the said plaintiff and his attorneys then and there well knew, or by the slightest inquiry could and should have ascertained and known. That the said embankment, with the apertures and openings therein on the 7th day of June, 1929, as alleged in said plaintiff's complaint, was constructed by your petitioner in the year 1898, the same as it was on said 7th day of June, 1929, and neither the said defendant M. L. Hare, nor the said defendant John Presthus, was in any way, connected with, or had any hand or participation in, the construction of said embankment and the openings therein. That on the said 7th day of June, 1929, said defendant Hare was your petitioner's Division Road Master and the only authority which the said defendant Hare, as such Division Road Master, and the said defendant Presthus, as section foreman, had in the performance of their duties was to keep the road bed and the tracks upon said embankment, as then constructed, in repair and in condition for the safe operation of your petitioner's trains, engines and cars in the performance of its duties as a public carrier of passengers and freight; and neither the said defendant Hare

nor the said defendant Presthus, has any right, power or authority to make any changes, alterations, or openings in said embankment, or any part or portion thereof, all of which the plaintiff and his attorneys well knew, [10] or could and should have ascertained and known, as aforesaid, by the slightest inquiry.

6. And your petitioner avers that the joining of said M. L. Hare and John Presthus as defendants in said action is sham and fraudulent, and without any real intention of prosecuting the action as to them, or as to either of them, to judgment against them, or either of them, but as a device and scheme, and for the purpose and with the intention of preventing and precluding your petitioner from removing said cause to the District Court of the United States, for the District of Montana, and for the purpose and with the intention of depriving your petitioner of the right to remove the action to said United States District Court, and defeat the jurisdiction of said court in said cause.

7. That your petitioner herewith presents a good and sufficient bond, as provided and required by the statute, in such cases made and provided, that it will enter into the District Court of the United States, for the District of Montana, within thirty (30) days from the date of the filing of this petition for removal, a certified copy of the record of this action, and for the payment of all costs that may be awarded by the said District Court of the United States, if said District Court shall hold



that the said cause was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that this action be removed to the District Court of the United States, for the District of Montana, and that this Honorable Court accept this petition and the said bond and proceed no further in said cause, except to make an order for the removal of said action to the District Court of the United States, for the District of Montana, and to approve the bond herewith presented.

NORTHERN PACIFIC RAILWAY  
COMPANY,

By GUNN, RASCH & HALL

Division Counsel.

HILDEBRAND & WARREN

GUNN, RASCH & HALL

Attorneys for Petitioner. [11]

State of Montana,  
County of Lewis and Clark.—ss.

E. M. HALL, being first duly sworn, deposes and says: That he is an officer of the defendant, Northern Pacific Railway Company, in the above-entitled cause, to-wit: one of its Division Counsel for the State of Montana, and makes this verification as such officer in said defendant's behalf; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

E. M. HALL.

Subscribed and sworn to before me this 21st day of February, 1931.

[Notarial Seal]

A. A. MAJOR,

Notary Public for the State of Montana.

Residing at Helena, Montana.

My commission expires February 28, 1931.

Due personal service of within Petition made and admitted and receipt of copy acknowledged this 25th day of February, 1931.

THOS C. COLTON

Attorney for Plaintiff. [12]

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[Title of Court and Cause.]

NOTICE OF INTENTION OF FILING  
PETITION FOR REMOVAL AND  
BOND ON REMOVAL.

To Nick Wagner, Plaintiff in Said Cause, and  
H. L. Maury and Thomas C. Colton, his  
Attorneys:

You, and each of you, are hereby notified that the Northern Pacific Railway Company, one of the defendants in the above-entitled cause, intends to and is about to file, on the 25th day of February, 1931, at 2 o'clock P. M., in the above-entitled court, and will present to the Judge of said Court, its petition that the said above-entitled cause be removed to the District Court of the United States, for the District of Montana, and also a good and sufficient bond on removal and will present said

bond to said Court for its acceptance and approval, in connection with said petition for removal, upon the presentation of said petition for removal to said Court. A copy of which said petition and of said bond on removal are herewith served upon you, together with this notice.

Dated this 21st day of February, A. D. 1931.

HILDEBRAND & WARREN  
GUNN, RASCH & HALL.

Attorneys for Defendant,  
Northern Pacific Railway Company.

Due personal service of within Notice and copy of Petition & Bond made and admitted and receipt of copy acknowledged this 25th day of Febry. 1931.

THOMAS C. COLTON,  
Attorney for Plaintiff. [13]

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[Title of Court and Cause.]

### ORDER OF REMOVAL.

The defendant, Northern Pacific Railway Company, having filed within the time provided by law, its petition for removal of this cause to the District Court of the United States, for the District of Montana, and having, at the same time, filed its bond in the sum of Three Hundred Dollars (\$300.00), with the National Surety Company, a good and sufficient surety, and conditioned according to law, and it being known that the notice

required by law of the filing of said petition and bond had, prior to the filing of said petition, been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the law, said bond and petition are hereby accepted and approved, and IT IS ORDERED that this cause be removed to the District Court of the United States, for the District of Montana, pursuant to the statutes of the United States, upon the payment by the petitioner of the regular and customary fees therefor; and this Court will proceed no farther in said action unless said action shall be remanded to this Court by the said United States District Court, for the District of Montana.

Dated this 25th day of February, A. D. 1931.

FRANK P. LEIPER

Judge.

[Endorsed]: Transcript on Removal. Filed March 27, 1931. [14]

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Thereafter, on May 28, 1931, Motion to Remand with Affidavits attached was duly filed herein, in the words and figures following, to-wit. [15]

[Title of Court and Cause.]

MOTION TO REMAND TO STATE COURT.

Now comes the plaintiff and respectfully moves the Court to remand the above-entitled cause to the District Court of the Seventh Judicial District



of the State of Montana, in and for the County of Wibaux, for further proceedings upon the following grounds:

I.

The petition for removal does not state facts sufficient to constitute any ground for removal.

II.

The petition on its face shows that the cause was not removable.

III.

The complaint on file in the action removed shows that there is not a separable controversy between Northern Pacific Railway Company, a corporation, and John Presthus and M. L. Hare or a separable controversy between said Northern Pacific Railway Company, a corporation, and John Presthus or [16] M. L. Hare.

IV.

Since the filing of the record in the above-entitled court John Presthus, a citizen of Montana, of which State the plaintiff is also a citizen, has joined with Northern Pacific Railway Company in a joint general appearance making an issue of law and thereby the defendant, Northern Pacific Railway Company, in so joining with John Presthus has waived all claim that the action presents a separable controversy.

This motion is based upon the affidavit of Thomas C. Colton; the affidavit of Lowndes Maury; the affidavit of Nick Wagner, the plaintiff above named;



and, it is also based on the complaint filed in the State Court, a copy of which has been certified to and filed in the said Court of the United States.

THOMAS C. COLTON

H. L. MAURY

Attorneys for Plaintiff.

Service of the foregoing motion together with service of each of the three affidavits mentioned therein and of notice of said motion is hereby admitted this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1931.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attorneys for Defendants,  
Northern Pacific Railway  
Company and John Presthus.

[17]

\_\_\_\_\_

[Title of Court and Cause.]

### AFFIDAVIT OF LOWNDES MAURY

State of Montana

County of Silver Bow—ss

LOWNDES MAURY, being first duly sworn on his oath, does say: that he is one of the attorneys for plaintiff in the above-entitled action at law and has been such since several days before this action was begun in the State Court; that plaintiff, in filing the complaint in the District Court of

the Seventh Judicial District of the State of Montana, in and for the County of Wibaux, acted entirely on the advice of co-counsel, Thomas C. Colton, and of affiant. That affiant knows more about why Presthus and Hare were joined as defendants than plaintiff or any officer of plaintiff; that the joining of M. L. Hare as a defendant was not and never has been sham or fraudulent, that there always, since its beginning and, for several days before its beginning, has been and now is a real intention of prosecuting the said action to final judgment against Hare. That the joining of John Presthus as a [18] defendant was not and never has been sham or fraudulent; that there always, since its beginning has been and now is a real intention of prosecuting the said action to final judgment against John Presthus; that affiant has practiced law continuously before the Courts of Montana and the United States Courts in Montana for more than twenty-five years last past; that where the convenience of witnesses and expense of procuring witnesses is equal between State and Federal Courts, affiant has usually sought originally the aid of the Federal Courts if such courts had concurrent jurisdiction of any particular action at law or suit in equity which affiant brought as attorney; for which choice of affiant the files of the Federal Court at Butte or Helena may be examined; that when making the preliminary examination of the merits of plaintiff's cause of action against defendants, Hare and Presthus, affiant was

informed that Hare as roadmaster ordered and stationed a train loaded with rock on to the embankment while the waters were rising on the embankment at Wibaux on the early morning of June 7, 1929, for the purpose of holding said embankment from being washed away, and thereby releasing the flood rising around plaintiff's property and affiant was informed that such act did retard the breaking of the embankment to plaintiff's damage; that affiant believed that such conduct of Hare created a personal liability on him for the resultant damage to plaintiff regardless of whether it was within the course of his service or not and affiant's first option as to such liability of Hare has been strengthened by reading the opinion of the Supreme Court (Court of Appeals) of West Virginia, in the case of *Taylor vs. Chesapeake and Ohio Railroad*, 7 A. L. R. 112, and in addition affiant was informed and believed that said Hare well knew, in ample time, to have reported to his superiors and repaired the condition before June 7, 1929, the insufficiency of the culverts and apertures set [19] forth in the complaint to carry off ordinary spring floods of Beaver Creek at Wibaux; that he knew that for many consecutive years in a radius of thirty-five miles from Wibaux, floods had recurred sufficient in size to break the Northern Pacific Railway roadbed and that such knowledge gave him good reason to believe that a flood the size of June 7, 1929, would occur at Wibaux and that he failed to report such knowledge to his superiors and failed himself,



as roadmaster, to remedy the condition; affiant had helped to establish the precedent in Montana that a superior agent is liable with his master for negligence whether it be an act of omission or commission—Hagerty vs Montana Ore Purchasing Co., 38 Mont. 69; that plaintiff is using reasonable diligence to procure service of summons on defendant, Hare, has for more than six weeks had in his employ one O'Neill a disinterested person above eighteen years of age, paid twenty (\$20.00) dollars to make service on Hare in this and other similar cases but so far plaintiff has been unsuccessful though said O'Neill has repeatedly called at Hare's residence in Glendive, Montana; plaintiff intends to continue his efforts to serve summons on Hare until it is done. This is not such a cause as under the laws of Montana summons can be served by publication.

That affiant was informed before this suit was begun that John Presthus, a track foreman for defendant railway on the section at Wibaux, had for fifteen years before June 7, 1929, intimate knowledge that the water had frequently risen on the railroad embankment at Wibaux in previous years; that he knew the condition was dangerous to plaintiff's property in times of annual flood that he failed to report the same to his superiors; that he failed to demand of his superiors that the condition be remedied before June 7, 1929, in time for his master to act; that he particularly was informed on June 6, 1929, of a flood in the [20]

watershed of Beaver Creek at Carlyle, twenty-five miles above Wibaux of enormous dimensions and that the same would arrive at Wibaux on the morning of June 7, 1929; that he did not report the oncoming flood to his superiors or ask permission to blast openings in the embankment; that for years before June 7, 1929, John Presthus had known of flood falling in a radius of thirty-five miles of Wibaux equal to the flood of June 7, 1929; that the track under his care had been repeatedly washed out by such floods within two miles of Wibaux; that with such knowledge he failed to notify his superiors of the dangerous approach of this particular flood and failed to guard against its damming on the embankment; that the rules of his master provided continuously for ten years before June 7, 1929, that for track foremen "defects in tracks, bridges, signals or any unusual conditions which affect the movements of trains must be promptly reported by wire to the proper authority" that as stated in the petition for removal Hare and Presthus both had authority to keep the roadbed on said embankment safe for the operation of trains; that the said roadbed on said embankment was not on June 6, 1929, or June 7, 1929, safe for the operation of trains to the knowledge of Presthus; that he knew before June 7, 1929, or had he used reasonable judgment, would have known that a flood would, unless additional vents were made in said embankment, back up on said embankment sufficient to wash portions away of both roadbed and



embankment; and as defendants allege that Presthus and Hare had authority to keep said roadbed safe for travel they had power to make larger openings in the embankment for the said natural water course in high water, because the only method of saving the roadbed would have also saved plaintiff from all loss; the flood which caused plaintiff's loss also carried away the roadbed in two places or more; that affiant has had experience [21] where an individual servant has been joined with a great solvent corporation and at the conclusion of the litigation the corporation was insolvent and the only payment of plaintiff's judgment were obtained from the individuals, and this against the same counsel now representing these defendants, to-wit: in the said case of Hagerty vs. Montana Ore Purchasing Company and Elliot Wilson, where had Wilson not been joined the fruitful judgment would have been entirely uncollectible; that in twenty or more cases commenced involving the same flood where damages respectively do not amount to three thousand (\$3000.00) dollars, affiant has caused plaintiff therein respectively to join Presthus and Hare as defendants and is prosecuting diligently against them in the State Court; that since procuring an order of removal from the State Court; and since filing the record in this court, as appears from the record, Northern Pacific Railway Company and John Presthus defendant, a citizen of the same state with plaintiff, have by the same counsel joined in and filed a joint general demurrer to plaintiff's

complaint, and thereby they have, and each of them has, waived and abandoned all claim and contention that this is a separable controversy as between said defendants.

LOWNDES MAURY

Subscribed and sworn to before me this 23d day of May, A. D. 1931.

[Notarial Seal]

MARGARET SHEA

Notary Public for the State of  
Montana. Residing at Butte,  
Montana.

My commission expires September 11, 1932. [22]

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[Title of Court and Cause.]

AFFIDAVIT.

State of Montana

County of Wibaux—ss

THOMAS C. COLTON, being first duly sworn on oath, does say: I am one of the attorneys for plaintiff above named; I have diligently studied the law pertaining to the above-entitled action and examined many witnesses and records as to the facts; I have believed from before this suit was commenced that there was a meritorious cause of action in favor of the plaintiff and against M. L. Hare and John Presthus, jointly, with Northern Pacific Railway Company. There has been from the beginning of the suit continuously and is now

a real intention of prosecuting the said action at law to final judgment against both M. L. Hare and John Presthus. That there has never been any fraudulent joinder nor any sham joinder of John Presthus to defeat the jurisdiction of the United States District Court; that there has never been any fraudulent or any sham joinder of M. L. Hare to defeat or avoid the juris- [23] diction of the United States Court; that affiant has, since this suit was commenced, believed always that the Federal Court under the law, as announced in Chicago, etc., *R. Co. vs. Tranbarger*, 238 U. S. 67, should and would, at the end of the evidence, grant a peremptory instruction to the jury to find for plaintiff and merely assess the damages.

THOMAS C. COLTON

Subscribed and sworn to before me this 25th day of May, A. D. 1931.

[Notarial Seal]

P. A. FISCHER

Notary Public for the State of  
Montana. Residing at  
Wibaux, Montana.

My commission expires August 10, 1932. [24]

[Title of Court and Cause.]

AFFIDAVIT.

State of Montana

County of Wibaux—ss

NICK WAGNER, being first duly sworn on his oath, does say: that he is the plaintiff above named; that before bringing this action he fully and fairly stated to his counsel, Thomas C. Colton, and H. Lowndes Maury, all the facts set out in the complaint so far as known to affiant, and also fairly stated what he expected could be proved about such facts by living witnesses that he was informed by such counsel that plaintiff had a meritorious cause of action against M. L. Hare and John Presthus and against Northern Pacific Railway Company; that he has from the beginning of the action and does still intend to diligently prosecute such cause of action against all three defendants to final judgment.

NICK WAGNER

Subscribed and sworn to before me this 25th day of May, 1931.

[Notarial Seal]

P. A. FISCHER

Notary Public for the State of  
Montana. Residing at  
Wibaux, Montana.

My commission expires August 10, 1932.

[Endorsed]: Filed May 28, 1931. [25]



Thereafter, on January 12, 1932, Order Denying Motion to Remand was duly entered herein, in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

No. 566 Nick Wagner vs. Northern Pacific Railway Co. et al.

The court having fully considered the within motion to remand to the state court, which was argued orally by counsel for the respective parties, also the several voluminous briefs, deposition and affidavits submitted, and now being duly advised, and good cause appearing therefor,

It is ordered that the said motion to remand be and the same is hereby denied.

Dated January 12, 1932.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Entered January 12, 1932. [26]

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Thereafter, on April 20, 1933, Answer was duly filed herein, in the words and figures following, to-wit: [27]

[Title of Court and Cause.]

ANSWER OF NORTHERN PACIFIC RAILWAY COMPANY and JOHN PRESTHUS.

Come now the defendants, Northern Pacific Railway Company and John Presthus, and for answer to the complaint on file in the above-entitled cause:



## I.

Admit that the defendant, Northern Pacific Railway Company, is a corporation, organized and existing under the laws of the State of Wisconsin, operating a railroad from Duluth, Minnesota to Tacoma, Washington, and thru the town of Wibaux, Montana; that said railroad crosses Beaver Creek in said town of Wibaux, at about right angles and in this connection alleges that said railroad has so crossed said Beaver Creek, and at the same location, since the year 1881; admit that Beaver Creek flows from the south to the north, but deny that said creek has a water shed of 720 or in excess of 342 square miles up stream from where said railroad crosses it in said town; admit that said stream has a length of about thirty-five (35) miles above said railroad crossing and that for most, if not all, this distance, it flows thru a prairie country without a heavy growth of trees along the banks of said stream, or its tributaries. [28]

## II.

Admit that said railroad crosses the valley of said Beaver Creek on an embankment and bridge and that the town of Wibaux is situated partly on the south and partly on the north side of said track and embankment and in this connection allege that said railroad had so crossed said valley on said embankment and bridge for more than forty-seven years prior to June 7, 1929; admit that said embankment is about 4000 feet long and about

15 feet high above the average low water level at the point where the bridge crosses the opening therein at Beaver Creek and that the height of the embankment decreases as it extends towards the sides of the valley on each side; admit that most of the town of Wibaux is situated within the Beaver Creek valley.

### III.

Deny that from June, 1928 to June 7, 1929, M. L. Hare was Master of the Road Bed and Ways of the defendant company at Wibaux, but admit that he was Division Road Master of said Company on the division embracing the portion of the track running thru the town of Wibaux, from April 22, 1929, until the present time, and that he is a citizen of Montana.

Admit that John Presthus, for more than ten years prior to June 7, 1929, was, and now is, section foreman on that portion of the railroad track crossing Beaver Creek Valley, and that he, during such time, has been a citizen of Montana.

Admit that plaintiff is a citizen of the State of Montana.

### IV.

Deny the allegations of paragraphs IV, V, VI, VII½ and VII of said complaint, and each and every allegation of said complaint not hereinbefore admitted or denied.

FOR A FURTHER ANSWER AND FIRST  
SEPARATE DEFENSE TO SAID COM-  
PLAINT, DEFENDANTS ALLEGE:

I.

That the Northern Pacific Railroad Company, the predecessor in interest of the defendant Northern Pacific Railway Company, con- [29] structed a railroad track upon its right of way and grade or embankment over and across said Beaver Creek valley in the year 1881, at the point where the town of Wibaux is now situated, and that said railroad track has been operated and maintained on the same right of way without any change, except the raising of the grade a few feet, ever since 1881.

That said railroad track was constructed across said Beaver Creek valley upon the right of way as granted to said Northern Pacific Railroad Company and its successors, by Section 2 of an Act of Congress of July 2, 1864 (12 U. S. Statutes, page 365). That the defendant, Northern Pacific Railway Company acquired said right of way and said railroad in 1896, and has, even since, owned, operated and maintained the same, except for the period from December 28, 1917, until March 1, 1920, when said railroad was maintained, operated and controlled by the United States Government.

II.

That ever since 1881, the defendant company and its predecessor in interest, have been familiar with



the rainfall, drainage area, and the physical conditions of said Beaver Creek, and Beaver Creek valley south of said railroad track; that from 1881 to June 7, 1929, said railroad track crossed said Beaver Creek valley on said grade or embankment; that from 1881 to 1884 said railway track crossed said Beaver Creek channel on a pile trestle bridge connecting with said grade or embankment on each side of said creek channel; that in the year 1888 three pile bents of said trestle bridge standing in said creek channel were replaced by a 44 foot Howe truss bridge, thereby giving freer flow to the water in said creek channel; that in the year 1896 the track and said grade or embankment were raised 3½ feet, and said Howe truss bridge replaced with a permanent 70 foot plate girder bridge with the ends thereof resting on concrete abutments and with a 20 foot plate girder bridge over the approach to the main 70 foot span at each end thereof; that in the year 1898 [30] the track and grade were again raised 5 feet and said 70 foot plate girder bridge and said 20 foot plate girders at each end thereof also raised 5 feet; that said permanent bridge, as completed in 1898, connected the ends of said embankment on either side of Beaver Creek and left an opening beneath said bridge 100 feet wide and about 15 feet above average low water level and about 7½ feet above any high water line known at or prior to that time; that the opening under said bridge thereafter remained the same until June 7, 1929.

## III.

That said grade or embankment, bridge and opening were constructed pursuant to and in conformity with the judgment, experience and skill of highly qualified civil engineers employed for that purpose, and in pursuance to and in conformity with the natural drainage, water courses, and surface conditions of the land in the vicinity and south of the town of Wibaux along the valley of Beaver Creek and its tributaries, and the flow of the stream at any season of the year since the construction of said grade or embankment in the year 1881. That said opening in said grade or embankment at Beaver Creek was at all times sufficient in size to handle and capable of handling in a reasonable and proper manner, all flood waters in said Beaver Creek valley prior to said flood on June 7th, 1929.

## IV.

That in 1912, the defendant company, at the request of the Council of said town of Wibaux, constructed a viaduct or under-ground crossing thru said grade or embankment at a point about 500 feet west of said railway bridge over said Beaver Creek, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top, and about 15 feet high; that said viaduct was constructed for use as a street crossing from the south side to the north side of said grade or embankment; that said viaduct is so situated that it did also carry off flood waters of Beaver Creek during the high water of June, 1929. [31]



## V.

That several years prior to the year 1929, the exact date being to defendants unknown, said town of Wibaux constructed a fill or embankment across Beaver Creek valley at the point where the street, known as First Avenue South, in said town crosses said Beaver Creek, and a bridge was constructed connecting the ends of said embankment on either side of Beaver Creek, and leaving an opening beneath said bridge about 60 feet long and about 10 feet high from the low water level; that said embankment was used as a roadway for the extension of said First Avenue South, was about 10 feet high, and located parallel with and about 600 feet south of said railway embankment and bridge.

## VI.

That the damages, if any, sustained by the plaintiff on June 7, 1929, and referred to in his complaint herein, were the result of an unusual, excessive, extraordinary and unprecedented rainfall and flood in said Beaver Creek valley, such as could not have been reasonably foreseen or anticipated by the exercise of ordinary foresight and prudence in the building and maintenance of said railway grade or embankment, opening, bridge, viaduct, and structures of said defendant company, and was not due to any negligent construction of said embankment, bridge, viaduct, or to the existence of the same.

## VII.

That said excessive, extraordinary, and unprecedented flood, caused by said rain, as aforesaid, came down said Beaver Creek valley in a wall of water about six or seven feet high and extended clear across said valley for a distance of about 2200 feet at a point along the south side of said town of Wibaux; that said wall of water moving north reached the south side of said town at about 8 or 9 o'clock A. M. on June 7, 1929, and passed north thru and across said town and against said highway embankment at First Avenue South, and flooded the buildings and property in said town, including the property of the plaintiff herein, to a depth of six or seven feet before said wall of water [32] ever reached the grade or embankment, bridge or viaduct of the defendant company.

That by reason thereof the damage to plaintiff's property was due solely to said unusual, excessive, extraordinary and unprecedented flood, wall of water, and embankment at First Avenue South, as aforesaid, and not otherwise.

FOR A FURTHER ANSWER AND SECOND SEPARATE DEFENSE TO SAID COMPLAINT, DEFENDANTS ALLEGE:

## I.

That said railway grade or embankment and bridge across Beaver Creek was constructed long prior to the time the said plaintiff had any title to, possession of, or right of possession in, of, or to,

the land possessed or occupied by him at the time of said flood on June 7, 1929; that said grade or embankment and bridge across said Beaver Creek are on the main line of the defendant company, between Duluth, Minnesota, and Tacoma, Washington, and consist of a 4000 foot embankment, about fifteen feet high, with a heavy steel bridge with concrete abutments, and the same are and were designed to be permanent structures and of a permanent character; that at all times after the construction of said grade or embankment and bridge up to June 7, 1929, and for many years prior to the time that the said plaintiff had any title to, possession of, or right of possession in, of, or to said land, occupied or possessed by plaintiff at the time of said flood, said grade or embankment and bridge remained as they were constructed in 1898; that on June 7, 1929, the opening beneath said bridge was capable of carrying as much water thru said grade or embankment and bridge, as aforesaid, and at all times after their completion were used to handle the water flowing in said Beaver Creek and Beaver Creek valley; and defendants allege, upon information and belief, that at the completion of said embankment and bridge by the defendant company in 1898, and for a number of years thereafter, the land owned, possessed, or occupied by the plaintiff, or upon which his property was located, on [33] June 7, 1929, was owned by and in the possession of persons other than the plaintiff, and that all such rights as were acquired or possessed by the plaintiff to use or occupy said



land, or place his property thereon, were acquired by him after the construction of said permanent embankment, and bridge, as aforesaid.

## II.

That if said bridge, over the opening in said embankment, for twenty (20) years previous to June 7, 1929, except two dry years, had annually prevented the flood waters of said Beaver Creek from taking their natural course down the channel of said creek, as alleged by the plaintiff, then the plaintiff knew, or, in the exercise of reasonable care and prudence, should have known the same to be insufficient to take care of the flood waters that would probably come down said Beaver Creek valley, and the plaintiff acquired title, possession, or right of possession in and to said land, or the right to occupy the same, with knowledge of, and subject to, such permanent conditions, as they existed by reason of said embankment and bridge at the time he acquired his title, possession, or right of possession to, or to occupy said land, and he is thereby estopped and precluded from maintaining this action.

FOR A FURTHER ANSWER, AND THIRD SEPARATE DEFENSE TO SAID COMPLAINT, DEFENDANTS ALLEGE:

## I.

That plaintiff's cause of action is barred by the provisions of Subdivision 3 of Section 9031 Revised Codes of Montana of 1921, and also by the provisions of Subdivision 2 of Section 9033 of the



Revised Codes of Montana of 1921, and also is barred by the provisions of Section 9041 Revised Codes of Montana of 1921.

WHEREFORE, having fully answered, defendants pray that they may be dismissed hence, with their just costs.

JOHNSTON, COLEMAN & JAMESON  
GUNN, RASCH & HALL

Attorneys for Defendants, N. P. Ry.  
Co. and John Presthus. [34]

State of Montana

County of Lewis and Clark—ss.

E. M. HALL, being duly sworn, says: That he is an officer of the defendant, Northern Pacific Railway Company, to-wit: one of its Division Counsel for the State of Montana, and makes this verification as such officer for and on its behalf; and on behalf of the defendant, John Presthus, who is absent from this county; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

E. M. HALL

Subscribed and sworn to before me this 19 day of April, A. D. 1933.

[Notarial Seal]

A. A. MAJOR

Notary Public for the State of  
Montana. Residing at Helena,  
Montana.

My commission expires Feb. 28th, 1934.

[Endorsed]: Filed April 20, 1933. [35]

Thereafter, on May 2, 1933, Reply was duly filed herein, in the words and figures following, to-wit:  
[36]

[Title of Court and Cause.]

REPLY TO ANSWER OF NORTHERN  
PACIFIC RAILWAY COMPANY  
AND JOHN PRESTHUS

Now comes the plaintiff and replying to the answer on file herein, admits, alleges and denies as follows:

1.

Admits that Northern Pacific Railroad Company, the predecessor in interest of the defendant, Northern Pacific Railway Company constructed a road track upon its right of way and grade or embankment over and across Beaver Creek Valley in 1881, where the town of Wibaux is now situated. That said railroad track has been operated and maintained on the same right of way since 1881.

2.

Admits that said railroad track was constructed across Beaver Creek Valley upon the right of way granted to Northern Pacific Railroad Company and its successors by Section 2 of the Act of Congress of July 2nd, 1864. That defendant Railway Company acquired said right of way and said road in 1896 and has ever since owned, operated and maintained the same, except for the period from

December 28th, 1917, until March 1st, 1920, [37] when said railroad was maintained, controlled and operated by the United States Government.

3.

Admits that in 1912 the defendant railway company constructed a viaduct through said grade or embankment at a point about 500 feet west of said road bridge over said Beaver Creek Valley, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top and about 15 feet high. That said viaduct was constructed for use as a street crossing from the south side to the north side of said embankment. That it did carry off some flood water during the high water of June, 1929.

4.

Admits the allegations in paragraph five.

5.

Denies generally each and every allegation in the first separate defense contained, save such as are herein specifically admitted.

And for a reply to the second separate defense in said answer contained, the plaintiff:

1.

Admits that said grade and bridge across said Beaver Creek are on the main line of the railway company between Duluth, Minnesota, and Tacoma, Washington, and consist of a 4000 foot embankment

about 15 feet high. That there was a steel bridge with concrete abutments.

## 2.

Denies generally each and every allegation in the second separate defense contained save such as are herein specifically admitted.

## 3.

The plaintiff denies generally each and every allegation in the third separate defense contained to said complaint. [38]

WHEREFORE, having fully replied he prays for judgment in accordance with the prayer of his complaint.

THOMAS C. COLTON

LOWNDES MAURY

Attorneys for Plaintiff.

State of Montana

County of Silver Bow—ss.

LOWNDES MAURY BEING DULY SWORN says: That he is one of the attorneys for the plaintiff and makes this verification on behalf of the plaintiff for the reason that the plaintiff is absent from Silver Bow County, wherein affiant resides. That he has read the foregoing reply and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

LOWNDES MAURY



Subscribed and sworn to before me this 1st day of May, A. D., 1933.

[Notarial Seal]

A. G. SHONE

Notary Public for the State of  
Montana. Residing at Butte,  
Montana.

My commission expires February 14th, 1935.

Service of the above and foregoing reply admitted and copy received this———day of April, A. D., 1933.

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Attorneys for Defendant.

[Endorsed]: Filed May 2, 1933. [39]

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Thereafter, on April 5, 1934, Verdict of the Jury was duly rendered and entered herein, in the words and figures following, to-wit: [40]

[Title of Court and Cause.]

### VERDICT

We, the jury in the above entitled case, find our verdict in favor of Nick Wagner, and against the railway company, defendant, and we assess Wagner's damages at the sum of 5000.00 Five thousand Dollars.

JOSEPH G. PARKER

Foreman of the Jury

[Endorsed]: Filed April 5, 1934. [41]

Thereafter, on April 14, 1934, Judgment was duly entered herein, in the words and figures following, to-wit: [42]

In the District Court of the United States in and for the District of Montana.

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Assigned to Billings

No. 566

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NICK WAGNER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation,

Defendant.

### JUDGMENT

BE IT REMEMBERED that this cause came regularly on for trial on March 26th, 1934, before the Court. The plaintiff was represented by Thomas C. Colton, Esq. and Lowndes Maury, Esq. The defendant was represented by Messrs. Gunn, Rasch & Hall, Johnston, Coleman and Jameson and Fred-eric D. McCarthy. A jury was duly impaneled and sworn to try the cause. Witnesses were sworn and testified on the part of the plaintiff and also on the part of the defendant. Counsel argue the cause and the Court charges the jury. The jury retire to consider of their verdict, and subsequently on April 5th, 1934, come into court and say:

(After Title of this Court and Cause)

“We, the jury, in the above entitled action find our verdict in favor of Nick Wagner and against the defendant railway company and we assess Wagner’s damages at the sum of Five Thousand (\$5,000.00) Dollars.

Joseph G. Parker

Foreman”

WHEREFORE, by reason of the law and the premises, IT IS ORDERED, ADJUDGED AND DECREED that Nick Wagner have and recover of and from Northern Pacific Railway Company, a corporation, Five Thousand (\$5,000.00) Dollars, together with interest thereon, and whereas, thereafter, on memorandum of costs duly filed and on motion duly made, the Clerk of the Court assessed the costs of the plaintiff at the sum of One Thousand Fifty-two & 53/100 Dollars.

IT IS ALSO ADJUDGED AND DECREED that plaintiff, Nick Wagner, recover of and from the defendant, Northern Pacific Railway Company, One Thousand Fifty-two and 53/100 Dollars, costs and both the principal sum of said judgment, Five Thousand (\$5,000.00) Dollars and the said [43] costs bear interest from the 5th day of April, A. D. 1934, at the rate of six per cent per annum until paid.

Dated April 14, 1934.

C. R. GARLOW

Clerk.

By C. G. Kegel, Deputy.

Attest the Seal of the Court:

[Court Seal] [44]

Thereafter, on Aug. 2, 1934, Defendant's Bill of Exceptions was duly signed, settled, allowed and filed herein, being in the words and figures following, to-wit: [45]

[Title of Court and Cause.]

#### DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED: That the above entitled cause came on regularly for trial at Billings, Montana, on the 26th day of March, 1934, before the Honorable Charles N. Pray, Judge of the above entitled Court, sitting with a jury; H. Lowndes Maury, Esquire, of Butte, Montana, and Thomas C. Colton, Esquire, of Wibaux, Montana, appearing as counsel for the plaintiff, and Frederic D. McCarthy, Esquire, of St. Paul, Minnesota; E. M. Hall, Esquire, of Messrs. Gunn, Rasch & Hall, Helena, Montana, and W. J. Jameson, Esquire, of Messrs. Johnston, Coleman & Jameson, Billings, Montana, appearing as counsel for the defendant, and the following proceedings were had:

The COURT: Are you ready for trial?

Mr. HALL: May it please the Court, I would like to move the admission of Mr. Frederic D. McCarthy of St. Paul, for the purpose of this trial.

Mr. MAURY: I would like to join in the motion.

The COURT: Very well. Mr. McCarthy may be admitted for the purposes of this trial. [54]

Mr. MAURY: There are two other defendants than the Railway, and five or six months ago, I gave notice that the case would be dismissed as to



those two other defendants. The plaintiff's case is dismissed as to John Presthus and M. L. Hare, and stands only against the Northern Pacific Railway Company.

The COURT: Very well. Let the record so show. If you are both ready, gentlemen, we will call a jury. (Jury drawn, examined and sworn to try the case.)

(Opening statement on behalf of the plaintiff, by Mr. Maury); (Opening statement on behalf of the defendant, by Mr. McCarthy).

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ALBERT PICKERING,

being first duly sworn as a witness on behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Albert Pickering; have lived in Wibaux since 1892. I have been in the store business, elevator business and poolhall business. I have worked on the section for the Northern Pacific Railway Company—the section west of Wibaux and running to Wibaux. We had a lot of rain in the spring of 1897 and 1898, and it washed out the track from about one mile the east side of Beaver Hill to Hodges; that is west. Part of that storm also took place in Wibaux. Some of the track was washed out between three and a half and four miles from Wibaux.

(Testimony of Albert Pickering.)

I recall the bridge that stood there from about 1896 until June 7, 1929. When that bridge was first built there, as to the condition of the ground between the pier and the abutment on the east side of the bridge and the pier and the abutment on the west side,—you could drive through on either side of the pier; we drove right on the bed of the stream. That condition remained— [55] well, I drove through there for four or five years, at different times, and under each side,—on each side of the pier. At that time that I am speaking of now, there was no viaduct here, nor any little viaduct for the children up here. A change took place under the east opening and the west opening there; it was filled up. Plaintiff's exhibit 4 is a correct representation of the change that took place under that bridge. This change was that it was filled up between the pier and the bank, on each side. That condition which is shown in that photograph remained there about twenty years,—until June 7, 1929.

Mr. MAURY: We offer in evidence plaintiff's exhibit 4. These pictures have exhibit numbers on them, your Honor; I think that would be better.

The COURT: Very likely.

Mr. McCARTHY: No objection.

The COURT: It may be received in evidence.

Mr. MAURY: I call to your attention (speaking to jury) the condition between the east pier and east abutment and between the west pier and

(Testimony of Albert Pickering.)

west abutment. You may pass it with that explanation.

My attention having been called to plaintiff's exhibit 1, I have seen that scene in Wibaux, I would say around about 1907 or 1908. I have seen it more than once—the condition of the creek—as portrayed in that picture.

Mr. MAURY: We offer in evidence exhibit 1.

Mr. McCARTHY: No objection.

The COURT: Exhibit 1 is received in evidence.

My attention having been called to exhibit 5, that is a correct portrayal of a scene that I have seen in Wibaux. That was taken before 1910 or 1911, taken before that time.

Mr. MAURY: We offer it in evidence.

Mr. McCARTHY: No objection. [56]

The COURT: It may be received.

Mr. MAURY: I call attention to the riprapping on each side of the creek and near the bridge.

Plaintiff's exhibit 25 portrays correctly scenes that I have seen once or more at Wibaux. I have seen a scene such as this, a number of times—I mean ice at the places where it appears to be,—in the years 1905, 1898, 1907 and 1921. Of course there was no ice then; I seen high water. Backwater from the railroad embankment caused those blocks of ice to remain there. I can see the embankment here (pointing to the model) that I speak of; this here, is the embankment. I see in exhibit 25 a house that was once the county court-



(Testimony of Albert Pickering.)

house; that was burned down before 1921,—I don't know just what year; I don't remember. No such house has existed in Wibaux, as this with the tower and cupola on top of it there, since 1921.

Mr. MAURY: We offer in evidence this picture, exh. 25.

Mr. McCARTHY: No objection.

The COURT: It may be admitted in evidence.

I said I was in the elevator business,—in the years 1910 and 1911. The elevators are right across from the Occident, this way. This (indicating) is the Occident. The ones you are pointing to now are the Farmers'. When I worked there, there was no Occident there. I worked in the J. C. Kinney elevator; it was on the east side of the track, and it is now on the other side—it was moved across. In the spring of 1911 I was working there and in that high-water, it backed up over the track and filled up the grain pit,—I mean this passing, or side-track, here between the elevators. It backed from the railroad embankment. Just the year 1911, I seen, that that water backed from the railroad embankment and into those elevators. I seen it back up over the track several times, and from the embankment. It filled up the grain pit and ruined what wheat we had in the pit. [57]

Describing some of the floods that happened there before 1921, and how they acted,—well, I seen high-water in 1905, 1911, and different times while I



(Testimony of Albert Pickering.)

lived there. I seen water come around the town two or three different times, from the west.

Q. What caused it to come around the town?

Mr. McCARTHY: Objected to as calling for a conclusion of the witness.

The COURT: Sustain the objection.

Q. Mr. Pickering, where would the water start backing up at that went around the town?

A. It came around by Orgain Avenue. Orgain Avenue, on the plat, is right here (indicating); so marked on the plat. As to where it would come from,—it came around this way. When it came around to the point which you are pointing to now,—the bridge,—and around to Orgain Avenue, Wibaux would be sitting on an island,—water all around the town. Comparing the elevations of the water to the north of the railroad track, that is, downstream,—with that water that was to the south, upstream, will say that the water would be higher on the upstream side. Before 1921, I have, five or six different times, seen the water higher on the upstream side of the embankment than on the downstream-side. As near as I can tell, that was in the years 1898, 1905, 1911 and 1921.

I was there in 1921. I noted a flood that took place in June. Describing that to the court and jury: it happened about 2:00 in the afternoon. We had a big rain in the south and southeast; she rained about an hour and water came down and made an island out of the town; came down both sides and went underneath the viaduct. By the “viaduct” I

(Testimony of Albert Pickering.)

mean this little road-bridge here. In 1921, the water was about three feet deep underneath the viaduct. As to how much of the town was above the water at that time—that did not get wet—it was all but this; do you want me to point to it? The water came down this street here and down [58] this street.

Q. You are pointing first, to First Street and second, to Second Avenue South?

A. Second Avenue and Orgain Avenue, and it came down the street.

I was not in the Davis Addition at all during that flood. I didn't look across and see what was there. This is the Davis Addition over here, and to the east of the creek.

On the morning of June 7, 1929, I woke up at 20 after 4:00; people were talking in the hall, about the creek being up, and I looked out the window. That is where I was (pointing out the building); that is the Chappell Hotel. I looked out to the south,—southeast; looked at the county bridge. When I looked out, there was some tourists trying to cross that and they had to back up. Between the elevator and the bridge was all flooded in there. That was about 20 minutes after 4:00—between 20 minutes after and 4:30. As to how wide an expanse of water I could see there at that time: I seen from the county bridge to the elevators here. I went back to bed again, stayed in bed, and I got up then 10 after 6:00. I looked out at that time; I went down to where I had my car; my car was on Orgain Avenue. I saw the creek coming up there and I

(Testimony of Albert Pickering.)

thought I better get my car out; it was sitting pretty close to Beaver Creek. To get to my car I come down Wibaux Street and turned east on Orgain Avenue. When I went down there, Wibaux Street was dry and Orgain Avenue was dry. I got my car,—I had another man get it. There was six inches of water in the garage and he asked me if he could help me get my car. I said “Yes”. My car was right there in the garage—this little building here (indicating). I didn’t drive the car away; he asked me where I wanted it, and I told him: “Put it up on Orgain Avenue on the corner,”—the place where I am now,—this place here, the corner of Orgain Avenue and Wibaux Street. Before water came into Wibaux Street at this point here, where I set my [59] car, it was about 10 minutes to 7:00. First, it come from the east and west.

Q. And which part of Wibaux Street was covered with water first, down towards Orgain Avenue or up towards the plaintiff’s place of business—Nick Wagner’s?

A. It come down from Nick’s first; it came down from the south.

Q. How long was Wibaux Street so you could walk along through it, after 10 minutes to 7:00? I mean at the point here, between Orgain Avenue and First Avenue South,—how long did it remain so you could walk through it there?



(Testimony of Albert Pickering.)

A. Well, I put my car up there—I first put my car up on the street; then I went and called my wife and told her we might have to get out of town; I told her the creek was coming up, and I walked down to the Chappell Building and looked around half an hour, and I come back up on the street where my car was, and the water was coming down Orgain Avenue both ways, from east and west. I seen we couldn't get out and I set my brakes—on the corner—and the water started coming down Main Street from the south and I says, "We better get back to the hotel," and we waded in water six to eight inches deep and back to the hotel, and we went to the roof of the Chappell Hotel; we could see it all for about two or three miles up the creek and down the creek. It was a gradual raise. In the Chappell Building the height of the water was about—the building I am in now, that was about the same height,—it was 52 or 53 inches. I noticed from the Chappell Building, from where I was up on the building, that there was plenty of stuff floating around. I saw the county bridge. Finally, the water got up to the bottom of it and lifted it off and floated it down the stream, in back of the depot. The east end lifted up first,—that is the end towards the elevator. It landed right in here (indicating), pretty close to where my garage was. \* That garage is located right on the end of Orgain Avenue. [60]

Mr. McCARTHY: That would be Orgain Avenue as projected to the east and just inside of the



(Testimony of Albert Pickering.)

railway right-of-way line—railroad property line.

Mr. MAURY: Is that it—that little house?

A. Yes.

Mr. McCARTHY: Just outside of the railroad property then,—the black line indicating railroad property.

It moved slow. As close as I can remember, it must have been between 8:00 and 9:00 o'clock that that county bridge lifted up. I recall where the Methodist parsonage was the day before; it was on Second Avenue; it is right on the corner there. That went away twenty minutes after the bridge went out, or fifteen,—I don't remember exactly. I noticed that before it started moving. I seen it floating out in the stream; it floated out in mid-stream.

Q. How far would you say it went east before it turned?

A. It floated right out in here (indicating),—to about a crack in the model,—right straight out. Then it came on down and landed near the depot here, about twenty-five feet from the depot. I think I would recognize a picture of it after it lit. Plaintiff's exhibit 9 is a correct representation of the Methodist parsonage after it came to rest near the depot.

Mr. MAURY: We offer it is in evidence.

Mr. McCARTHY: No objection.

The COURT: It may be received.

(Testimony of Albert Pickering.)

I could see other objects floating around from my point of view; I seen about everything coming down the street.

Q. You saw some come down the street. About what time did they come down Wibaux Street? What were some of the objects you saw coming through?

A. Piece of a barn,—I couldn't tell what they was,—lumber and stuff.

As to when the embankment broke, I should judge it was about, pretty close to 10:00 o'clock in the morning; it kept crumbling.

Q. Could you see from where you stood or not, any difference in [61] the elevation of the water below the fill and above it? Or could you see?—On the other side of the track?

A. I could see the water going underneath there, yes. I could see it going underneath the viaduct.

Q. What, if you could observe was the difference in elevation between the water north of the track and south of the track?

A. Like a waterfall.

Mr. McCARTHY: Objected to, if the Court please. That is an approximation there.

The COURT: That is all you intended? Approximately?

Mr. MAURY: That is all I intended.

Q. You may go ahead. What was, as far as you observed, the difference in elevation?

(Testimony of Albert Pickering.)

A. It looked to me like between four and five feet difference, that was from my point of view. The north side was the lowest. As it went through the viaduct, it looked like a waterfall. The course that objects took that came to it,—it looked like going over a waterfall; I am speaking now before the embankment gave way. I didn't observe any animals going through the viaduct; there was a cow swimming around, but she didn't go through the viaduct that I seen. That cow was swimming around the building known as the Orgain Building on Orgain Avenue and Main Street. That is this building right here (indicating),—swimming around in here on the back of it and side of it. She was swimming around there until the water went down and she got up on top of the sidewalk. I think it was Fred Zapfi's cow—I am not sure; I don't know where his stable was; she was around there for half an hour I imagine. I saw a horse swimming around. That horse was on Orgain Avenue (indicating), right about in here.

Mr. MAURY: Your Honor, by putting in rebuttal testimony, we don't want to be foreclosed from putting in other rebuttal testimony—

The COURT: Well if you have no objection—  
[62]

I did not see anything at that time in the way of a wall of water. I did not hear anything of that kind,—any rumble. When the embankment went out, the water went down, and then she raised



(Testimony of Albert Pickering.)

about six inches afterwards, or an hour afterwards. Between any first and second rise, so far as I could see, there was about six inches difference.

Cross Examination:

(By Mr. McCarthy).

My attention having been called to the relief map that we have here before us,—at the edge of the map furthest away from the jury, there is a white mark standing upright, I recognize that as the statue of Pierre Wibaux. Immediately back of the Pierre Wibaux monument, there are some crosses right there near the clerk's desk. That indicates the cemetery; the cemetery is on a pretty high hill. The Pierre Wibaux statue is on ground that is a little higher (not considerably higher) than the town of Wibaux is on. If water poured on the Wibaux monument, part of it would run towards the town and part wouldn't. It is on a hill,—a little hill. The high ground extends on towards the cemetery, getting higher as you get towards the cemetery. South of town, directly east of the Massey place,—the part that you are pointing to there,—that is also high ground,—higher than the balance of Wibaux. And to the east of the center of the Davis Addition,—say that if we projected Olive Street directly east of the intersection of Regina Street and Olive Street,—there is high ground. There is a valley there,—in fact, there is high ground all around Wibaux.



(Testimony of Albert Pickering.)

Q. Wibaux is right in the bottom of a valley—the town of Wibaux—isn't that right?

A. Part of it is in the valley and part of it is up on the higher bank. So, if we had a rainstorm in 1921 and it rained out near the cemetery and the Pierre Wibaux monument, I would expect that water to come down into the town; it would come down there. [63]

Q. And if you had a rain that is on the east side of the town over here, in the District immediately east of Mr. Massey's place on down, on the easterly edge of the town, and east of the Davis Addition, the water, you would expect, on that high ground there, would drain off into the Davis Addition?

A. Drain off into Beaver Creek.

Q. It would drain into the Davis Addition before it would get into Beaver Creek?

A. Well, it would come around.

Q. Well, suppose it rained all along here,—I am pointing now from the southerly edge of the map, the high ground at the southeast corner, to the railroad embankment on the north,—to the north,—and the east extremity of the railroad as shown on the map, it rained all along this high ground there on the edge, or what is shown here on the relief map as the edge of the map, why the high water would all terminate down into the Davis Addition?

(Testimony of Albert Pickering.)

A. Some would and some wouldn't. If it rained over on this slope here, that wouldn't go in the Davis Addition.

Q. Oh, I see. If it rained over here on this little section, it wouldn't but the great part would all drain down into Possum Hollow and some to the Davis Addition?

A. Some of it would go into the slough there and some into the Davis Addition and some into Beaver Creek,—from this section here.

The railroad property is outlined here in black. I see the black line on the model just to one side of Esther Street and then running to the creek, then running on down across the map, and then on the other side of the railroad embankment, another black line. I understand that indicates the railroad property. The elevators are on railroad property. The railroad property is lower than other parts of town; it is a low place down here near the elevators between the railroad embankment and the elevators,—well, some of it is on the same level as the town and some isn't. The space from the elevators,—this is a piece of low land in here. [64]

Q. What space will you put it? Everything to the north of First Avenue and west of the easterly elevator and then east of the creek,—this section all in here?

A. This is low land in here. This here is on about the same level as Wibaux is on. In here is a baseball diamond; it is up on a bench here.

(Testimony of Albert Pickering.)

Q. But the low land to the west of the slough and north of First Avenue and south of the railroad track and east of the creek, is all low land, isn't it? It is a low place?

A. It is a low place in here (indicating).

Q. I am taking in everything west of the slough and north of First Avenue east of the creek, and south of the railroad embankment,—this low section outlined here by the slough, First Avenue and the creek, that is all low?

A. I showed with the stick where the low land was,—using the slough as the edge; then up to First Avenue, then up on the north side of the Avenue,—it is low over there too—low on both sides of First Avenue,—all low in there.

Q. If you will examine the map carefully, you will see that it is low. So, if you had rain draining off the sidehills and down through Possum Hollow and coming down through the culverts of the side-track running to the elevators, you would expect it would collect there, wouldn't you Mr. Pickering?

A. It would collect in the low place, yes. But it ain't on the same level as the elevator.

This county bridge that went out in 1929 was a steel bridge, wooden floor. I can't give you any idea about how many tons that bridge would weigh. I wouldn't say it did weigh in excess of 20 ton; I wouldn't want to guess at it; I don't know how much it weighed.

My attention having been called to plaintiff's exhibit 1,—the picture,—and to a mark about half



(Testimony of Albert Pickering.)

way between the man standing here and the telegraph pole, I see a pencil mark "X" on there. That mark indicates the cement wall at the Wibaux house; the "X" [65] indicates the cement wall at the Pierre Wibaux home,—or the stone wall; I think it was built of stone.

In addition to the county bridge going out and the parsonage going out in 1929, I saw lumber going down the street; I didn't see no barn,—parts of a barn or something like that, I saw.

The railroad embankment didn't go out at once; it crumbled away or gave way gradually.

The county bridge, composed of steel with the exception of the wooden flooring, didn't at any time back up away from the railroad embankment after it started to move. It moved towards the railroad embankment, not the bridge; it moved northwest towards the railway embankment; it moved north and it moved west. But at no time after it started to move did it move to the south.

Q. From the time you first saw the Methodist parsonage going out, it moved first to the east and then to the north, is that correct?

A. And it moved northwest. At no time did the Methodist parsonage move to the south.

When I stood up on that Chappell Building, I looked to the south, and all up Beaver Creek valley there was an enormous expanse of water,—there was a lot of water; and it was wide; the high-water was over a great width. That was true as far up the



(Testimony of Albert Pickering.)

valley as I could see—a couple miles that I could see. When I stood on the Chappell Building, I seen objects moving in that water down the main street there; they moved down Main, or Wibaux, Street; moved on down in a northerly direction,—well, a lot of it went west; a lot of stuff went down Orgain Avenue, shingles and stuff like that.

Q. Before getting as far north as Orgain Avenue, when you saw objects moving down Wibaux Street to the south of Orgain Avenue, the objects were moving in a northerly direction?

A. I seen shingles coming out of that lumber yard there, coming straight west,—I can show you—— [66]

Q. Well, put it this way: Did you see objects moving on Wibaux Street before they reached Orgain Avenue, that were moving north?

A. Well, they had to move north coming down the street; they had no place else. I didn't see those objects moving south; I saw them moving west, but I didn't see any moving south—saw them moving west—coming out of the lumber yard going west.

After the railroad embankment had gone out, the water went down first, then came up again—come up about six inches; there was a six-inch rise in the water after the railroad embankment had gone out; after the water went down, come up about six inches in about an hour.

Q. Now, Mr. Pickering, when you have in mind

(Testimony of Albert Pickering.)

Wibaux Street or Main Street, as it leaves your pool room and goes north under that viaduct and over to the community church, if the rear end of your building—if we took the center of Wibaux Street at about even with the rear of your building, that point in Wibaux Street would be considerably higher than Wibaux Street opposite the Congregational Church, wouldn't it, Mr. Pickering?

A. I don't think there is much difference between the——

Q. Stop and think of it! Isn't there quite a pitch down here, so that this point down here near the Congregational Church, is it not quite a little lower?

Mr. MAURY: May I suggest that we have exact measurements on these elevations; and that this is improper cross-examination.

Mr. McCARTHY: I want to show that the ground slopes there.

The COURT: You will have to do that by some other witness. He says he doesn't think there is very much difference.

It was about noon—12:00 o'clock, the day of the flood, that I came down off of the roof of the Chappell Building. I imagine it would be about two hours after the railroad embankment went out [67] before I came down.

(Testimony of Albert Pickering.)

Redirect Examination:

(By Mr. Maury).

These objects that went from the lumber yard here towards the west were bundles of shingles. They floated west up near the Catholic Church. Right there (indicating) is the Catholic Church; they floated right below it. Of course, during all this time, there was some water going through the bridge and some through the viaduct.

Q. And there was a general slow movement due to that debouchment of the water that was in the lake?

Mr. HALL: Object to that as leading.

The COURT: Yes.

After the water went down, I seen that the north end of William Manning's building was stove in. A great big stump was inside of that building. The front wall, facing the track, was stove in. I don't know how big a hole there was compared with the stump that was on the inside; I just see that big stump in there.

Q. How did the hole correspond with the stump?

A. Well, it kind of caved the front of the building in,—the lumber part of it.

Q. Is it possible that the stump could have come from any other side?

A. I don't think; no.

Mr. McCARTHY: Objected to as calling for a conclusion.

(Testimony of Albert Pickering.)

The COURT: He can give the result of his observation,—whether it would be possible, in his judgment, from his observation,—not saying all of the details surrounding it.

Q. Could it be possible?

A. No, sir; there was buildings all around the back part of it, and sides of it.

Q. Did any appreciable water, as far as you could see, come from up towards the Pierre Wibaux monument?

A. No; not as I noticed now. I am speaking about June 7, 1929; no appreciable water come from that. There was no water falling in Wibaux when I got up [68] that morning at 4:20. I went to bed at 12:00 o'clock and it was raining then in Wibaux.

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JEAN WEBBER,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Jean Webber. I was working in the telephone office the night of June 6th and morning of June 7th, 1929. It is in the same block east of Nick Wagner's place. In the evening of June 6th I went on shift about 6:30 I think. I worked there on shift until I left the next morning about 7:00 o'clock. As to what called my attention to water rising in that neighborhood,—it was about 6:00



(Testimony of Jean Webber.)

o'clock in the morning and I was awakened by the ringing of the switchboard. We have a little apartment back of the office. So I got up and dressed and put up the shades to the south and also to the north in our rooms. I could look out then and see the water. I looked out south first and I saw water just in the creek. Then I walked back to the north and saw water flowing from the north towards the telephone office. "From the north", I would describe that also as from towards the railroad fill. As it came from towards the north, towards our building—it came towards our building and ran down some basement steps back of our building. Those basement steps are right back of Nick Wagner's place. When the water was running down the steps of Nick Wagner's place, the condition on the south side of our building there on First Avenue South was dry; there was no water on the bank. I didn't leave the office until about 7:00 o'clock and before there was any water on the street in front of the building south, there was water to the depth of a hub of a car which sat back of our place just a few feet away. I remember Mike Heckaman taking his car, but I wasn't paying attention; I was there notifying [69] people; I was just answering rings as they came. What caused me to leave the telephone building was the water coming over the road to the south of the telephone office. I saw it come up over the edge, then I wakened my mother. She was in the apartment, which is a room

(Testimony of Jean Webber.)

right back of the telephone office; it is in the same building.

There wasn't any depth to it as it first came over the street there; it just seeped over the edge and then gradually came across and over the sidewalk and into the door, and it was about the depth of my waist when I left. I didn't observe anything in the nature of a wall of water coming in there. I could see out by Nick Wagner's place from the windows of our place and I could see some of the street in front of the Crescent Hardware here,—a little. I first observed water in that section after I had seen it in the back; it was quite a while after I had seen it in the back—not so very long before I left the building. As close as I can remember, about an hour elapsed after the water came into the back door of the telephone building before it commenced to come over the street in front. I went, after I vacated with the water waist-deep, on top of that block in which the Wagner store is located,—this block here (indicating). I remained there until in the afternoon, somewhere around there. The water rose 5½ feet in our place; I don't know how high it was in Wagner's store, but it was that high at least.

When I got on top, I could observe all this country to the south as far as Massey's. I just saw water there and houses as they—the surface of the water was level. I saw no wall of water that morning. I saw the county bridge go out. The east end of the bridge sort of raised up first, then floated—swung

(Testimony of Jean Webber.)

over and came northwest. I think it was at least 20 minutes after that that the Methodist parsonage went out. When the Methodist parsonage left its foundation, I could still see the eaves of it,—the [70] roof and the eaves, and it went directly east until it floated down past Mr. Dahl's blacksmith shop. (You are now pointing to Mr. Dahl's blacksmith shop).

Mr. McCARTHY: Dahl's blacksmith shop is just east of the intersection of Second Avenue South and Wibaux Street, is that right?

A. Yes, sir.

It went on the south side of Dahl's blacksmith shop,—floated down this way (indicating). It was going east but south—well, it was going straight east, south of Dahl's blacksmith shop. When it passed where the county bridge had been, it was moving steadily,—not rapidly, but steadily. Comparing it with the way one walks, I would say it was going a little faster than you were walking. I don't drive a car. I think it was going four or five miles an hour. I didn't see that building lift up and go from around the water tower. I could observe the railroad bridge from where I was. I could observe when the embankment commenced to crumble near the railroad bridge. As to the time of day with reference to other events,—it was after we had been up on that block some time; I would say it was around 10:00 o'clock in the morning. As it crumbled it went slowly. The height of the water on it when it crumbled, with reference to the ties on



(Testimony of Jean Webber.)

the bridge, it was quite well towards the top; I don't know just what the distance was. All the time, of course, some water was running through the bridge. I could not observe the viaduct from where I was. The water going under the bridge, from my point of view, looked like—I couldn't see on the other side—but it looked like it might have been sloping through, but I couldn't see north of the bridge; I couldn't look through there; I didn't. I couldn't observe the water up near the tower; from my point of view, that was not observable; nor a house that was standing right here (indicating).

Cross Examination:

(By Mr. McCarthy). [71]

The Methodist parsonage moved east and then north—slightly northwest. I at no time, saw that Methodist parsonage after it started to float away or move away, move to the south. As to how deep the water got on the parsonage, I could see the roof at all times; you might say about all I could see was the roof and the eaves—from the eaves up, the parsonage was exposed to view and from the eaves down, it was under water. It was moving along slowly, steadily, about four to five miles an hour, as well as I can judge. It possibly may have been going a little faster and possibly may have been going a little slower, but it never stopped; and it never moved to the south; it moved to the northwest and landed close to the depot against the railroad embankment. This steel bridge, with the wooden floor-



(Testimony of Jean Webber.)

ing, when I saw that go out, it moved northwest and not to the south; it moved north and west, but at no time moved to the south.

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MRS. FRANK O'KEEFE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Maury).

My name is Mrs. Frank O'Keefe. I have lived in Wibaux since June, 1910. In those early days I was a school girl. The part of the town I lived in first was the Davis Addition, over to the east of the stream. I went to school at the Wibaux County highschool; that was over here (indicating). I would get to school from my place in certain seasons or the springtime, by going around over the railroad track; it would be by coming around the hill and over the railroad track. I would come up over the railroad track on account of the high-water. The high water would be over the county road that leads towards the elevator and the one that leads towards the Addition. You are pointing to it—that is the county road that I mean. I have done that quite a few times [72] in the spring, that I would come over the railroad track to get to school, because of high water there. I went to school about

(Testimony of Mrs. Frank O'Keefe.)

eight years, and it wouldn't be every spring that I did that, but it would be numerous. That was before June, 1929.

In 1929, the water was higher on the south side of the railroad fill than on the north or downstream side. I hadn't observed that before or paid any attention to it,—I hadn't paid any attention to it. I don't know how far upstream in the spring, this water that I found right here on the county road would extend,—all along the creek I guess.

I got up at 6:00 o'clock on June 7, 1929. I was over in the Davis Addition. I was staying in this house here (witness indicating a house close to the southeast corner of Beaver and Olive Streets). Was called at 6:00 o'clock, by Mrs. Blair of Wibaux. She called me and told me the creek was coming up; that we should get up. At that time, the creek wasn't up to our place yet; the water wasn't at our place in the Davis Addition. I had a view over to town, I mean across the creek into the main part of town. I couldn't see the Mattie Miller House from our place, but I could see over in the direction toward the town there was plenty of water—or lots of water. I could see the plaintiff, Nick Wagner's property from where I was,—the top of the building. I saw objects floating in that water. I saw a barrel and it was floating from the north to the south; saw it coming down the street and I watched it until it got to our place. It was in the Davis Addition when I noticed it—probably a block from our place up the

(Testimony of Mrs. Frank O'Keefe.)

street towards the railroad—that I first observed that that barrel was coming from north to south. I watched it until it came down to our place; I should judge it was a city block. The barrel lit right along our fence; it was bobbing along there. I don't remember of seeing it after the flood subsided. I could see the Methodist parsonage go; I didn't see it until—I saw it going towards the railroad [73] embankment; that was the first time I observed it. I didn't see a house move up near the water tower; that was out of my vision.

I was not in the same house in 1921; was in the same Addition. There was more water in the Davis Addition in the 1921 flood than in 1929. As to how much deeper it was,—well, it was over a foot at the house where I now live in 1921, and it didn't reach that height in 1929. In 1929, the water didn't get into the house where I now live at all.

Q. In 1921, what was the immediate direction from which the water came?

A. Well, it rained mostly all afternoon, and hard,—in town. I don't know how high the creek rose in 1921; it didn't come up into the town very much in 1921. As to how much deeper it was in the Davis Addition in 1921 than it was in 1929,—I don't know how deep it would be; it was probably six inches deeper at the place where I am at now,—at least that, in 1921.

Q. Do you recall any incidents of people being rescued in the Davis Addition, in 1921?



(Testimony of Mrs. Frank O'Keefe.)

A. Yes, sir.

Q. Who were some of those people and where were the houses? Point them out.

A. My sister was taken from the house where I live now, in 1921.

Mr. McCARTHY: I object to this line of testimony as incompetent, irrelevant and immaterial to any issue in this case. It appears now from the exhibit in evidence, that the water, in 1921, that got in the Davis addition would necessarily come from the sidehills and the draws. The witness has told us that the water didn't get up in the town from the creek; therefore, it would have no question on the adequacy of the railroad bridge or not; it has nothing to do with the case.

Mr. MAURY: The range or the locality is the test. In that locality, it may be gone into to show notice,—35 miles in any direction— [74]

Mr. McCARTHY: The witness says the water of 1921 didn't get up in 1921 and do any damage. It is possible that it got up in the Davis Addition. What bearing could it have on the—

The COURT: You gentlemen ought to know. You have been through this enough. It may have some bearing on it, and I will overrule the objection. Let it be shown briefly. I don't think we need to go into all the houses.

Mr. McCARTHY: Exception.

(Question repeated):

A. Well, from the house that I live in now, my sister was taken—



(Testimony of Mrs. Frank O'Keefe.)

Mr. McCARTHY: Pardon me. May it be understood, in order to save time, that my objection, and ruling and exception, may apply to all of them?

The COURT: Yes; go ahead.

A. And different houses in the Davis Addition,—in the Yuell house; I believe it was this one here, (indicating the house about midway between Lincoln Avenue and Grant Street, and facing Bushman Street); and this one; and there was someone taken from this house here, and from that one; these two other houses were that square one there (indicating the house on the corner of the block, Regina Street is on the east of it, southwest building in the block); and this one is in the northwest corner of the same block.

With reference to pointing out high-water marks of the 1921 flood to Mr. R. A. Lyman, I showed him the high-water marks of the Yuell house—it is the farthest house in that block; and also at my own place. I didn't show him any others. I showed him truly and correctly what those high-water marks were.

On the morning of June 7th, the people were moving to the south; I went to the first house south when I left our place; and the direction that other people were moving was to the south. The [75] reason they were going to the south was because the water was coming from the north and as it backed up, we backed up too. That morning, some of the people went up on the hill directly south. My people and I went south and we crossed what is known

(Testimony of Mrs. Frank O'Keefe.)

as Possum Hollow and came up on the hill where I used to live.

Cross Examination:

(By Mr. McCarthy).

I mean that in 1929, the people got up on the high hills to the south of the Davis Addition. Some of the high land is to the south of the Davis Addition. It was not right away that some of the people went there for refuge, but we just kept going south all the time.

When I went to school, the foot-bridge that leads to the county bridge had not been built. When I went as a school girl over here to the high school,—I lived here in the Davis Addition—and I had to get over to this high school, and at that time, there was no foot-bridge along here parallel to Beaver Street, or on Beaver Street. The foot-bridge is across low land, and when it rained, water got down in that low place and it got muddy; it extended across both the roads. And there being no bridge, there was no other way to go, but around by the railroad bridge to get through. As to whether it was to keep our feet dry and clean, and whether there was a suggestion that it was so deep that we could not get through, will say that we couldn't have waded; sometimes we went by team and wagon; a team and wagon could get through without any trouble. The water wouldn't get up in the wagon box; there wouldn't be any such depth as that.

I didn't see the county bridge got out in 1929. I saw the Methodist parsonage, but only after it was

(Testimony of Mrs. Frank O'Keefe.)

moving to the north or northwest; I couldn't see from my place, when it left the foundation. As to the depth of the water: somebody said the parsonage was going, and I could see just the top of it,—I could see all of [76] the roof, but I couldn't see below the eaves. The house moved all the time I was watching it in a north or northwesterly direction. I haven't any knowledge as to how fast it was going; I could just see it moving. At no time that I looked at it was it moving to the south.

Redirect Examination:

(By Mr. Maury).

I didn't see anything that resembled any wall of water there that morning.

I knew a Miss Edith Jones. I don't recall seeing her there that day at all. I knew her well at that time by sight. I had known her ever since I came to Wibaux, about.

Q. I mean June 7, 1929?

A. Yes, sir. I don't recall seeing her that day. I was back and forth among people that were watching that stream that day. There was more than a dozen people there, as far as I recall, watching the stream rise.

Q. Among them, you did not see at all Miss Edith Jones?

A. No, sir.

Mr. HALL: We object to that as repetition.

I was there that day, June 7, 1929, watching that stream, until about 11:00 o'clock. The water went



(Testimony of Mrs. Frank O'Keefe.)

down during the morning, then it started to rise again. It didn't rise again very much, but it was noticeable; we didn't have any marks, but we just noticed it. As to about what time one could walk in the streets of Wibaux, will say that I went up to the railroad embankment in the afternoon and watched them take Mrs. Lochray from the tree,—in the boat; but I didn't go down town. I didn't notice people walking down town or moving in automobiles. That was in the afternoon, but I didn't know what time it was.

Recross Examination:

(By Mr. McCarthy).

I spoke of rescuing Mrs. Lochray from a tree. That tree was in here somewhere, north of the railway embankment. [77]

Mr. McCARTHY: The witness indicating a point north of the railway embankment and north——

A. I don't know whether it was on this side of the creek or this one, but we stood over here. I wouldn't say where the tree would be with reference to the black line indicating the railway property, but it was in here some place; it may have been south of the railway right-of-way line and it may have been north. But it was somewhere in the vicinity of the railway property-line, possibly a little north and possibly a little south, and I am not positive now whether it was east or west of the creek.



(Testimony of Mrs. Frank O'Keefe.)

Q. But the water had been so high north of the railroad embankment that Mrs. Lochray had taken refuge in the tree?

A. Her house is in the low land; I don't know what time she went there, but I watched them get her out.

(By Mr. Maury).

They got her out after the railway embankment broke; I should judge it was 5:00 o'clock.

(By Mr. McCarthy).

The house I lived in in 1921 they didn't put a foundation in it after that; it is just as it was then. The house I am living in now wasn't raised after 1921. The Yuell house wasn't the one I lived in in 1921; in 1921 I lived here—this one (indicating a house east of Regina Street).

(By Mr. Maury).

Q. This is the house you lived in in 1921? (pointing).

A. Yes, sir.

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ED. SHERMAN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Ed. Sherman. I lived in Wibaux on June 7, 1929. I got up that morning about 5:00 o'clock. My place of [78] business was the Crescent Hardware on Wibaux Street, to the south across the street from Nick Wagner's place. When I got up,

(Testimony of Ed. Sherman.)

the water had got up to our building and I dressed at 5:00 and come downstairs and went down to the basement to close the window, or a trap door we have in the basement, and I got that closed and came back upstairs to pull up a pipe that we use for the overflow of a cistern. I pulled that up and then I went in to have a bite of breakfast and before I was through, they said the water was coming up in the store. When I finished my breakfast, or when they called me, I went down thinking I might save something in the basement and Warren got down in the basement when the water came around the front and into the cellarway that comes in from the north of the store. It was a metal door that I closed. They were put there to keep—when the water came up, it always broke the window we had there, and we put that down there when the water came up, so the rubbish and stuff couldn't go down in there. That would occur in the spring of the year.

I was there in the flood of 1921. Shortly after the flood of 1921—I couldn't tell when—those were put in our basement. In 1921 I boarded up the window, and I thought I had it high enough so the water wouldn't run over it. It lacked one or two boards more and I thought it was high enough, but it was not, and it run into the basement. Since 1929, the water has never come into our basement.

On the morning of June 7th, after I ate breakfast, I came downstairs. As to the depth of the water in front of my place or Nick Wagner's,—

(Testimony of Ed. Sherman.)

when I came down it was just filling in. I came to the front door as I came out of the basement, and the water met me at the front door. Wagner's was right across the street; I didn't notice how deep it was towards Wagner's at that place.

I walked across the street from my place—south-west from the store—to what is known as the Davis house, or Elliott is living [79] there. I couldn't tell the real depth of the water in front of the Elliott house when I got there; because I didn't measure it. On me it was probably up to the knees, I don't know; I was there quite a little while waiting for Mrs. Elliott to come out of the house so I could take her to safety. When the water got up to their porch, I told her she would have to come, because I couldn't stay there longer, because it was gradually getting deeper, and I figured I couldn't get her out if she waited much longer; so I carried her out.

Q. Where was her house now, that you carried her from? Take the ruler. Now, where is Mrs. Elliott's place?

A. This is the Crescent Hardware (indicating south of First Avenue South and east of Wibaux Street). I was over on the other side. This is our place here. Then, it is right over there.

Mr. HALL: That is the little X-shaped house in the center of the block. \*\* It is an X-shaped building on the west side of Wibaux Street and about the middle of the block, between First Ave. South and Second Ave. South.



(Testimony of Ed. Sherman.)

I took Mrs. Elliott up to the corner in front of the—it was the Drake store. That is diagonally across from Nick Wagner's. I didn't leave her there; I waited a little while for Mr. Hanson to come with the truck and then I carried her so she could get on the truck, and he took her up the street to what is known as the Chappell Hotel, and he came back and I crossed the street to the Crescent Hardware again and our women-folks were there and we started out to take them out from there. We started out to carry them, but the water had gotten so deep then, so that we figured we wouldn't be able to carry them; so we had to walk. The depth of the water then on Main Street was just above the knees. I didn't see anything that looked like any wall of water coming through there that morning; there was no such a thing.

I went up on top of the Chappell Building. I had a vision of [80] the viaduct and a building beyond the viaduct, from the Chappell Building. You are pointing now to the Community House.

Q. You had kind of a social interest in that, being a trustee?

Mr. HALL: Locate that building; it hasn't been located.

Mr. MAURY: All right; that building is north of the railway track; it is the first building north of Nolan Avenue and to the west of Wibaux or Main Street.

There is a church between that building and the corner; they look like they are built together as one. There is kind of a porch—you might call it a porch—



(Testimony of Ed. Sherman.)

on the east end of that building which is called the Community House. From the Chappell Building to that, I could observe the action of the water on that building. I observed a door swinging open in the wind. I don't know how long it swung open, but when the water was the highest on the south of the viaduct, that door was still swinging open. After the viaduct had washed out, then the water raised so that it struck the door and swung to the north then. The door stayed there until the water went down and I presume then it swung out again. I don't know how long it stayed with the water pressing it against—because I was looking other directions. I say “when the viaduct went out”—the ground near the viaduct—the fill on each side. I don't know how much of the fill washed out on each side; there was quite a little of it.

Q. How long after the water got to its crest and at its highest, did that door continue to swing in the wind, as near as you can tell us?

A. Well, until the embankment went out and then, of course, the water raised and then it got up to the door and then swung open.

#### Cross Examination:

(By Mr. McCarthy).

My place of business is located on Wibaux or Main Street; it is directly south of First Avenue South—the building you are [81] pointing to—and it is directly west one block, of the county bridge. There is a low place at the rear of our store; the

(Testimony of Ed. Sherman.)

ground is lower at the rear of our store than it is on Wibaux Street. I never had any water bother the windows on Wibaux Street in 1921 or any other time; it just got to the back on the south there in 1921. The back is right directly up there—low—directly up from the creek. On the back of our building we had a window,—on the east side of the building—east end,—the east end towards the creek. It used to come up there and break the window and so I put a metal cover over it.

On June 7, 1929, when I got up on top of the Chappell Building and looked to the south, I could see up the valley.

Q. There were places you could see where the water was over half a mile wide?

A. I didn't pay much attention to that; I was looking around through the town. I wasn't interested in whether more water was coming; I was paying attention to stuff on Wibaux and saving stuff—the stock, and——

Q. Water on Wibaux—depending on how much came from the south?

A. Well, no,—after yes,—I wasn't paying much attention to the south country. I presume that there was water more than half a mile wide up the valley.

When I got up to that place to rescue Mrs. Elliott, there was water on Wibaux or Main Street, and it was flowing north on Wibaux Street; and when I got Mrs. Elliott and started back across the street, there was water flowing on Wibaux Street, and that water was flowing north.

O. S. DRAKE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is O. S. Drake. I came to Mingusville in 1892. [82] Wibaux used to be called Mingusville, and was when I came there. I have followed the livery business quite a long time. I first was just a drayman. I worked for Walter Osterhouse the first year or two that I was in Wibaux.

I recall a flood or rise of water that took place in Wibaux in June of 1921—13 years ago. Approximately, the southern part of the town was covered by that flood, and a loop around by the railroad track towards the Orgain property. That is the Orgain house that you are pointing to, and that is on Orgain Avenue and the first house to the east of D Street. The damage that flood did to the railroad embankment to the east of the bridge, there was a considerable washout on the east embankment close to the east pier, which was afterwards—they hauled rock and dirt and filled in, because it was washed out so much that the railroad was unsafe, I should judge. I never was there to measure that, but I know there was considerable new work put in there soon after the flood of 1921; they riprapped it quite a lot higher than it was before at that time.

Q. Do you recall further up the track about 3,000 or 4,000 feet to the east, what happened in 1921?



(Testimony of O. S. Drake.)

Mr. McCARTHY: Objected to as incompetent, irrelevant and immaterial,—outside of the drainage area of Beaver Creek—and not material to any issue in this case.

The COURT: That might be in the drainage area. I don't think the question is definite enough so we can determine. Is it within the drainage area?

Mr. MAURY: I don't know the exact distance of the drainage area——

Mr. McCARTHY: May I ask a question or two?

Mr. MAURY: But whether it was or not, we purport to show the strength of that storm all the way to Medora 35 miles, to show the power of storms that might be expected [83] by the railroad company in that locality, under the decision of the Supreme Court.

The COURT: I think I will overrule the objection.

Mr. McCARTHY: Exception.

Q. What, if anything, happened to the railway track about 3,000 feet to the east of the depot?

Mr. McCARTHY: In order to save time, may we have the same objection, and the ruling, and exception? \*

The COURT: Yes.

A. Well, off a little further east than the stock-yards loading chutes, there was quite a little water went in there and this embankment was washed or



(Testimony of O. S. Drake.)

softened so that there was an engine overturned in there while it was pulling out of town. By the "stockyards", I intend to convey the idea of this thing on the map here, which you are pointing to, and near the intersection of the switch with the main line; it was east of the stockyards, I wouldn't say how far; I never measured it.

Q. Do you recall if the thing I show you is a picture of what happened at that point in 1921 on the Northern Pacific line?

A. Yes, sir.

Q. Is that a correct photograph of it?

A. It is a photograph of the engine as it laid there for several days.

Mr. MAURY: We offer it in evidence.

Mr. McCARTHY: Objected to as incompetent, irrelevant and immaterial, not bearing on any issue in this case, and outside of the drainage of Beaver Creek, so far as Beaver Creek south of the railway track is concerned.

The COURT: Overrule the objection.

Mr. McCARTHY: Exception.

On the morning of June 7, 1929, I got up about 4:30 I should judge. My place of business then was on the main street of [84] Wibaux in what is known there as the Stipek Building. That is the place there; you are pointing to it. It is directly west of the Crescent Hardware Company and katty-cornered across the street from Nick Wagner's

(Testimony of O. S. Drake.)

place. I was following the general mercantile business there.

At that time we lived over in what is known as the Davis Addition. I slept there the night of the 6th—in my home. On that night, in Wibaux, it wasn't raining when I went home—possibly 9:00 or 9:30; then in the night, we had a heavy rain, I don't know just what time. There was no rain when I got up that morning of the 7th; it was raining in the night. I don't believe any rain fell that day until 4:00 o'clock. Going from my home to my place of business that morning, we took the street going directly north to the county bridge. I crossed the county bridge. When I crossed the county bridge, the banks was full; it was a good high river; it was a good raise then. What I call the "banks", the main stream that the bridge spans; what I call the "bench" is the main stream that the bridge spans. Then there was water above that bank, out on the flat. When I crossed the bridge, the water was up on that flat back of the Crescent Hardware store there—the basement. When I got to my place of business, the first thing I done was to try to get the neighbors up at the Crescent Hardware; I tried to get my neighbors up around, because I see we was having a big raise, and the Crescent Hardware was right across from my store. In 1921,—they have got an east basement window——

Mr. McCARTHY: That is objected to——

(Testimony of O. S. Drake.)

The COURT: That was all gone into by the other witness.

I went into my place of business and started to take my merchandise out of the cellar and straightened around; also, I sent for my son. He worked in the store with me and I sent some boys down there to call him, so as to have him come up. [85]

Q. Did you wake up anybody else?

A. Well, unless I did the Crescent Hardware "boys"; that was about the first thing I done—was to try to call them, which I did. They didn't have any 'phone upstairs. I worked in my store about one hour I should judge. The water finally caved in the south wall, fell in—and the water came in from the west and from the south into my place; that is what drove me out of my cellar. When I went up from the cellar, the water was on the south around my place, and up near to the front of the store. The street runs north, and it is quite a little higher as it advances to that street north of my store. But no water was between me and the Crescent Hardware. There was no water north to the viaduct, only in this low place west, running to the Orgain Building. When I came out, it was all backed in and as high as it was in 1921, but not running in through the street between the Crescent Hardware and down towards the railroad, towards the depot. After that, the water kept gradually rising. So, I had a lot of tobacco and dry sugar and stuff on the floor, and I tried to set my garden



(Testimony of O. S. Drake.)

seeds up on my counters, off the floor. The water raised very fast, but not in no bunches. The first thing I knew it was running onto my floor. Then I set this other stuff up—all the dry stuff I could onto my counters, and I should judge it was 6:00 or 6:30 when it was coming into the door about eight inches. It took eight inches in this store to begin to run through to the viaduct down Main Street. At that time, the water was higher towards Main Street than it was there,—towards Main Street, the part of Main Street that is directly north from the Stipek Building—from where my store was towards the depot, past the Orgain Block and the bank and the Sawyer store. The Sawyer store is on the next corner next to mine. That is the highest part of town—the highest part of that street in town. After that—well, at my place, it was near knee-deep, and I started to go to the depot; started to go north [86] to the viaduct, thinking I could get up on the railroad track and possibly go home. I had no definite plan which I could do now; I had no plan made. As to how far I got down Main Street,—well, I got nearly one-third of the way across from the corner of the brick building, where I see the viaduct was full; it was higher down there than where I was, so I stopped and there was a cream station—By the viaduct I mean this little bridge here under the railroad; I was going from my place of business here, towards there, to get out. As to where I stopped in



(Testimony of O. S. Drake.)

my course, and why: Right directly across from the Wagner store is what is called the Sawyer store now; it was built by the Woodburn Brothers. That is on the northwest corner of First Avenue South and Wibaux or Main Street; and the next building joining that is the butcher shop, and the next building joining that at that time, was a cream station. That building I speak of as a cream station is now gone—vacant; and there was a stairway on the north side of this cream station,—outside stairway,—so I stepped in there to get my breath and rest. The height of the water on me when I went in there was possibly 18 inches,—knee-deep,—but I stepped in on the step, so I could see down the street both ways. As to who joined me there: well, our neighbor, J. D. Cullen, came across from the viaduct there—his lumber office. He has been Mayor of Wibaux. The lumber yard where he was coming across from, is the thing you are pointing to south of the depot,—on the right-of-way. Joe Cullen was trying to come across from that corner. When I first saw him, I should judge the water was around waist-deep on him. He had in his hand what I call a four-horse neckyoke, off a four-horse drill,—to hitch four horses up. He was using it as a cane, a prop, to steady himself as he advanced across. The water when I first saw him, was pulling him back towards the Orgain residence up towards the viaduct,—up towards this residence that you are indicating; and from this corner the water seemed

(Testimony of O. S. Drake.)

to have a pull [87] on him there and it looked like he wasn't going to come across to my side of the street. What happened to him: well, there seemed to be a few feet there as if he was released, and he came on over and he came to where I was and we both went up these stairs, and the house was vacant above. On the back is a back-door, Yale lock there, and there is a platform there on the level with this butcher shop,—eaves of that,—and we went up there and stayed up on there through the storm—through the flood. After that, the water raised rapidly. Probably, when we got up there, it was 7:30 or 8:00 o'clock, and it just kept on gradually raising—steadily raising, until I should judge, about 9:00 o'clock, then it hesitated; and really we thought it was going down. We had no marks. The Building joining us there was a weather-boarded building,—frame building. We could judge on the window of that by counting these boards, how much it raised, when we were looking somewhere else,—sometimes on the front of this butcher shop. There was this Sawyer building; I couldn't see south and I couldn't see to the back end—anything on the south and west of me. When I came back, I would count these boards; possibly we were gone fifteen or twenty minutes, and it would be four or five inches higher or something like that. There was talk between me and Mr. Cullen,—we had no way of measuring it. As we saw it, we thought there was a second rise of water.

(Testimony of O. S. Drake.)

I should judge 9:00 o'clock it checked and we thought, if anything, it lowered itself, and the next time we came back, it was four inches, or a lap of weatherboard higher than it ever had been before. Then we didn't know whether it dropped or not. It kept on raising until about 10:00 o'clock. When the water commenced to recede, it went down lots faster than it came up this big raise. It started going down about 10:00 o'clock when the railroad embankment gave way. And the bridge was in such a place behind the Chappell Building, that I couldn't see the bridge; I couldn't see the depot either, but I [88] could see the eastern edge of the viaduct. From where I was standing, the first I noticed of the break-up, I should judge 40 or 50 feet of it gave way at one break-down; and there was a sidewalk—a stairs that went over this embankment, and the breaking of the sidewalk and the cracking of timber was loud enough in all that, that we could hear it above the flood—the storm—or above the noise of the water that morning. It was quite windy that morning. That wind was south of me; it came from the south and east; it was pretty hard to get warm; we could get up—it was a square front—and we could look. The wind blowed quite hard—enough to make quite a lot of waves; the expanse of the water, it would cause quite waves. If you had been on lakes where I have been, it would make good heavy waves on the surface of the water; it made the water rough;



(Testimony of O. S. Drake.)

there was a heavy wind; it was a steady wind. As to the length of time that elapsed after this breaking away that I saw to the east of the viaduct from where I was here, before I went down on the street and could walk around,—well, it was after noon quite a little; I wouldn't be sure whether it was 12:30 or 12:00 o'clock or 12:30, or something like that, when my son come by so he could walk on the sidewalks. There was five or six inches of water and mud possibly, down there, and he went down and opened the store and got us a lunch of sardines and crackers on the shelves up above the water. The height of the water mark in my place of business after I went back to it on that day—the highest point of the water was 5 feet seven inches—nearly 6 feet. I pointed out to Mr. Lyman high-water marks at my place, as of June 7, 1929. I pointed out to Mr. Lyman other high-water marks at different parts of the town,—at what I call the green house; that don't mean it is a greenhouse. That is the green house you are pointing to. And then different places,—the store building, I showed him the marks there—at the Stipek Building, where my store was at that time; and then on the north part of the town [89] different places I showed him the water marks where the water was. I pointed them out truthfully and accurately; they were very plain at that time and there would be no guessing; they was plain to be seen and fresh. At the present time, I could show



(Testimony of O. S. Drake.)

you water marks, but it wouldn't be so positive. It was quite a while there was water marks on that store building—the highest point it was—and that is the first time I saw water on that corner. With reference to 1921, I showed Mr. Lyman some of those high-water marks on the north side. While on the south side, the old green house, I could show him approximately where it was, there is no marks of that—but I could show him on the windows of the basement, but not quite as good as where the marks was there.

I was running a livery stable in 1921, directly across from the Methodist parsonage, right this side of the green house on that vacant place in there. My livery stable is immediately north of the green house and directly south of Charlie Dahl's blacksmith shop—just a street between us. My livery stable was facing on Main Street. In 1921, the water got possibly, in the office, 30 inches—2½ feet, and in the main part of the barn, being two steps down, it was possibly 3½ foot. In 1921, that was directly after dinner when the raise came and it was down out of the barn by evening, so I really don't recall how long it did stay at the high stage. It generally takes three days for those floods to run down to normal after a flood. The stream would be quite long and it takes that long for a flood. But the main flood was off of that flat by evening, or before night. That flood of 1921 stood at the crest possibly 3 hours or 4 hours,—1½ to 3 hours. I had

(Testimony of O. S. Drake.)

so much work to do that I wouldn't be sure how many hours, but it was down out of the barn before evening, so we could bed our horses and put our stock back in the barn. In 1921, I didn't notice objects floating around—not so very much.

In 1929, I was in a place I couldn't get away, and I could [90] see quite a lot of stuff floating. Some of it would come up to Wibaux Street and go east, and some come out of the same warehouse and go west and lodge in back by Orgain's house; and others would come in and lodge by the depot, and others would go through the viaduct. When I say "came up Wibaux Street", I call it from the south going north—I call that going north, because I am higher at the First National Bank at that corner, than I am down at the old green house, or where my barn used to be, so I always called it "up".

Q. What have you to say as you looked around over the water there on June 7, 1929, if it conveyed to you a level or rough surface, except for these wind-waves?

A. It was,—only where the wind would strike it, we would call it rough water; where the wind hits on the water, it was kind of rough water. From the Wibaux Machine & Auto Company, barrels, tires, old sheds, lumber,—and it didn't have no place to go. Lots went down to the bridge—all that could get through—and this other went through the viaduct, lots of it,—but lots of it didn't have no steady current because it was dammed up and

(Testimony of O. S. Drake.)

it wouldn't take it away all at the same time. I didn't mention that it took water a certain length of time to get out of my livery stable—not out of the livery stable—but out of the main channel that come up back of Charlie Dahl's shop, and back of my livery stable was filled in with manure from time to time as we filled up, but the water came up to that level; but we never had it in the livery stable only that two times; when I was there, only the one time onto the barn-floor proper.

Cross Examination:

(By Mr. McCarthy).

When I speak of the green house, I refer to the house sometimes called the Mattie Miller house; it was where Mattie Miller was living at that time. That is the house a short distance north of the intersection of Beaver Creek and Wibaux or Main Street, [91] and directly to the east of Wibaux Street, and it is south of Second Avenue South. You are pointing to the Dahl blacksmith shop; it is across on the north side of that street going in front of the Methodist church; it is east of Main or Wibaux Street, right on the corner; it is on that corner at least—the Charlie Dahl shop. The blacksmith shop to which I am referring is a very short distance—almost in line with Second Avenue South, if Second Avenue South was projected,—it is projected—slightly to the north of Second Avenue.



(Testimony of O. S. Drake.)

Q. Now, your livery barn, in 1921, was somewhere in between the Miller house and the Dahl blacksmith shop?

A. It was on the other corner straight from the Methodist church—directly east of the church, right across the street,—facing the north; it was east of Wibaux Street, right directly south of Charlie Dahl's blacksmith shop, right opposite the church there. The livery barn faced on Wibaux or Main Street, and the part of the livery barn that was on Wibaux Street, the ground at Wibaux Street where the livery barn opened onto Main Street, or Wibaux Street, was higher than the ground where the rear of the livery barn was located, and in this low ground here, in 1921,—some water got in this low place.

Q. Did any water get up on Wibaux Street in front of your livery barn in 1921?

A. There was bare ground in front of the livery stable in 1921 all the time.

Q. There was no water in front of your livery barn?

A. In front of the barn there was quite—it was lower.

Q. The livery barn was a little below the street level?

A. The front of the barn was quite a little lower than up on the church-side. Down in front of the barn was level also, then kind of a slope. I had a dirt floor—just gravel and scoria at the main part of the barn.



(Testimony of O. S. Drake.)

Q. There was no water running down Wibaux Street in 1921?

A. The [92] water came down in 1921 up to the Crescent Hardware.

Q. But there was no stream flowing down Main or Wibaux Street?

A. There was a lot of water in front of Charlie Dahl's blacksmith shop.

Q. Yes; in the low land east of Wibaux Street. But was any flowing down Wibaux Street?

A. Plenty of water.

The COURT: Answer the question.

A. The water flowed down as far as the Crescent Hardware.

Q. Did it flow up in front——

A. Yes, sir; in front of the barn, but not in front of the church. I don't believe that Wibaux Street at the intersection of First Avenue South is higher than Wibaux Street where it goes under the viaduct.

I said that I came to Wibaux in 1892. I worked as a cowboy there for Pierre Wibaux,—one summer for Mr. Wibaux. I worked on the range all over that country where Wibaux is now,—north of the track and south of the track. I went a considerable distance south of the railway embankment—clear to Ekalaka, I suppose; that would be quite a ways south of tributaries of—forty miles south, and probably forty or fifty more. So, I was familiar with the country for a great many years.

(Testimony of O. S. Drake.)

I ran this store about five years, I should judge, before the 1929 flood. When I went over to my store the morning of the flood, there wasn't any water on Wibaux Street when I got to the store. I would say it was about 7:00 o'clock when water was on Wibaux Street in front of my store,—that was quite high. The first water I saw around my store was on the west end and south side; that is the first water I saw in the vicinity of my store—it was on the west and south side of my store. The railroad embankment is north of my store, and the first water I saw was on the south side and on the west side; and that was around 7:00 o'clock when I saw water there. I started, of course, as I said, [93] to get my stock out of the basement and get it on the floor, and later, I became alarmed and abandoned my store. When I went out of my store I walked north on Wibaux Street; I was on the west side of the street. When I left the store, it was between 7:00 or 7:30—about half past 7:00, and at that time, there was water on Wibaux Street and over the sidewalk. I had to walk in water when I went north on Wibaux Street. At that time, at the store, it was about 18 inches deep, and as I was going down the street towards the railroad, it was shallower, because there was higher land there, but it soon raised to about 18 inches there. This water I was walking in on Wibaux Street was apparently flowing north. I got up on top of the building there next to the

(Testimony of O. S. Drake.)

butcher shop—we got up on the cream station—what we called it at that time; it is tore down and burned and tore down. We got from that—started up onto the butcher shop, where the butcher shop is now. From where I was I could not see the valley to the south, on account of the brick building and Sawyer's store. This water that I saw the heavy waves on was right on Main Street, as we looked towards the green house and towards the Davis Addition. They were rolling kind of from the southwest katty-cornered, coming from the southeast, and coming towards me—towards the northwest; from the southeast and rolling to the northwest.

Q. You didn't see any waves rolling from the north to the south, did you?

A. Not unless it was up close to the Orgain building on that corner, but there seemed to be a wash there of different directions; I didn't see any waves rolling from the north to the south.

When I was up on top of this building, the water raised rapidly until 9:00 o'clock. Then, it was kind of a question there whether it seemed to go down,—we don't know whether it did; it seemed to stand still for a while. At any rate, the raising of the water stopped. That is what I thought at that time, that [94] that water was going down; and then the water after a few minutes, started up again, and it continued to rise and it got quite a lot higher than it had at 9:00 o'clock.



(Testimony of O. S. Drake.)

In response to counsel's question, I spoke of articles coming up—articles moving in the water—floating or being carried in the water. By “coming up”, I mean they were coming from the south and going north—coming towards me and going down the stream.

Of my stock, I had in the basement of my store possibly 150 cases of canned goods,—possibly that,—I wouldn't be right sure. I don't think that I carried any of that up the stairs before I had to leave my place of business; I carried it over to the stairs and stacked it there. The water came too fast for me to get my stock of goods to the first floor; I might have got a few cases, but I don't think I did.

Q. Of course, if you had expected a flood, you wouldn't have had a stock in the basement?

Mr. MAURY: A man has the right to occupy his property any way that they wish and they presume that a railway company will not be guilty of negligence. We want to state our position in the matter.

\* \* \*

The COURT: Go ahead.

Mr. MAURY: Our exception.

Q. If you had anticipated a flood, you wouldn't have carried your stock down in the basement?

A. I could explain that.

Q. Answer the question.

A. I expected the water to come up around the building. It looked like it would come as high



(Testimony of O. S. Drake.)

as in 1921. I “guess” the basement was completely filled with water; it got up above the basement—got up 5 feet above the first floor. If I had anticipated 5 feet of water, I wouldn’t have been in the store; I would have moved a long time ago. [95]

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CHARLES E. WHITE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Charles E. White. My occupation is that of newspaper owner and publisher in Wibaux, for the last 20 years. My place of business is in the same building with Nick Wagner, and was in the same building on June 7, 1929; it was in the same location in June of 1921.

Q. In June of 1921, how close in your building, or to your building, did the water from the creek come?

A. Well, in a very close proximity, backing down from the railroad embankment over the basements of the building and filling our building to the extent of one or two inches. Some water came across the road from behind the Crescent Hardware Company and spilled over the entry-way down into the place where my business was located. When the water was coming over the road to my place

(Testimony of Charles E. White.)

of business I was standing right on the corner of the Nick Wagner store. Plaintiff's exhibit "X" is a correct photograph taken from the other side of the creek, of a scene which I saw that afternoon, in June, 1921.

Mr. MAURY: I offer it in evidence.

Mr. McCARTHY: No objection.

The COURT: It may be received.

I should say that that water standing at the level as shown in exhibit "X" that afternoon, in June, 1921, went down within about one or two hours.

I was acquainted with what is called the viaduct across Main or Wibaux Street in 1921. At that time, that was not a concrete viaduct, as it is now. As to the kind of a hole through the embankment that was there, it was just a mere wooden structure with piers in the middle. On the south side—the upstream side—of the [96] viaduct, in June, 1921—as to the height the water went through that viaduct and where it came from, will state that I saw the water seek its level at the railroad bridge on the east, meet the water coming from the west and join at the center of the viaduct and endeavor to make its escape at the viaduct. On the south side that water was from three to four feet deep.

Q. How far did it extend up Main Street? I mean to the south,—in June, 1921?

A. Might I explain the action of the stream as I saw it at that time?

(Testimony of Charles E. White.)

Q. Yes. Can you tell us how far upstream did it extend that evening, so far as you saw it on Main Street?

A. The water in 1921 coming from the west, as I saw it, came by the water tower at a spillway, seeking its course in a northerly direction and then swinging around here and a curve coming east of the railroad, joining together, and endeavoring to escape to the north side of the viaduct.

Q. Where did it turn east? Where did that water coming from towards the water tower in 1921 turn towards the east?

A. Well, that water came by the usual and customary backing up of that stream when it met at the embankment of the railroad——

Mr. McCARTHY: I ask that that be stricken as not responsive.

The COURT: Strike it as not responsive.

It turned east I should say within a line by the water tower—I don't remember my streets—I know the locations. Right here (indicating on relief map) and then east on Orgain Avenue.

During the years I have been in Wibaux, I have noticed a custom of that stream in ordinary recurring high rains. Describing what that custom was before 1929,—I seen flood conditions in 1915, about, —1916, 1921, 1923, and at the height of flood waters, it was customary for the water to come in from the south and meet with the resistances at the railroad embankment and back up to the [97] south



(Testimony of Charles E. White.)

of the town again and swinging around in a horse-shoe fashion, coming in on the west and meeting the current coming from the railroad bridge on the east and damming itself up at the viaduct, which appeared to be too small for a spillway. That course, I should say it was a natural thing for it to do, with no sufficient get-away. When it backed up from the railroad bridge, it would break over the embankment between the water tower and this street on the east of it—between the water tower and the street on the east of the water tower.

I was in Wibaux on June 7, 1929. My home was to the north of the track at that time, and my place of business to the south. I was acting mayor at that time. I got up about 7:00 o'clock in the morning. I went with my family to the higher ground, because there is a raise there which constitutes the valley—the raise on the west and the east. I found people homeless and driven out of their homes. When this water was three or four feet deep at the viaduct in 1921, the depth of it on my lawn to the north was about one or two inches—just high enough to trickle across the lawn—seeping over a one-inch or two-inch foundation fill of the basement of my home. That morning, the 7th of June, 1929, I went around on high land to the west of Wibaux, to care for my people who were in jeopardy. I observed the course of the water or the action of the water in the region towards the Davis Addition, and in the region of the water tower. I



(Testimony of Charles E. White.)

would like to give the reason for my observation at those points, if I would be permitted. We had people housed in one home, that was standing upon the cook-stove with their two children, with water nearly up to their waists. On the next street south, we had another family,—a woman with two children seated on the second upper ledge of her home, and I had men testing the currents on those streets to see whether it would be advisable to send a man with a wagon and team in there to see if they could stand the rise—the force of the water—to [98] see if they could get away. Consequently, I was enabled to obtain the action of that water during the entire flood period. With reference to a contact of waters—waters coming from one direction striking waters coming from another,—according to my observation, there was a continuous swirling in the town during the entire flood period. You could hardly tell whether water was coming from one direction or another. There was a continuous swirling and at the time of the going out of the Methodist parsonage, the water seemed to be boisterous and receding back from the railroad embankment to the south of the town. As it receded back from the railroad embankment towards the south and about the time the parsonage went out, there was a very turbulent rolling of water. I have seen various bodies of water rolling, and if you wish me to describe the going-out,—that disastrous happening of the parsonage going out,—I was on the

(Testimony of Charles E. White.)

opposite bank when it went out and a continuous roll of water came in from the main stream and met the back-coming current and just lifted the parsonage up and carried it out in a rather orderly manner, I should say—for water. I didn't see another building lifted up here at this point near the water tower. My attention was attracted to the parsonage because I knew the church bell had rung and that people in that vicinity were in danger.

When the flood was over in Wibaux, I was acting as mayor. I sent or joined in sending Charlie Donnelly, President of the Northern Pacific Railway Company, a telegram. Exhibit X-4 is my handwriting, and the copy; that is a copy of the telegram which I sent.

Mr. McCARTHY: I have no objection.

(Exhibit X-4 read to jury by Mr. Maury).

I got a letter in reply to that from Charles Donnelly. That is the letter.

Mr. MAURY: We offer it in evidence (X-2).  
[99]

Mr. McCARTHY: Objected to as immaterial, if the Court please, having no bearing on any issue in this case.

The COURT: I don't know but what it may be. You allowed the other to go in and I don't know of any reason why this should be kept out.

Mr. McCARTHY: Note an exception.

(Exhibit X-2 read to jury by Mr. Maury).

No report was ever made to me as mayor as the result of any investigation.

(Testimony of Charles E. White.)

Q. Do you know of any report as the result of that railroad investigation having been made to anybody?

A. No, sir.

Mr. McCARTHY: I would object to that. There is nothing to indicate that there was any report coming to Mr. White.

Mr. MAURY: He was acting mayor.

Mr. McCARTHY: Why would the railroad company make a report to him as a result of an investigation?

Mr. MAURY: Because if the investigation were adverse, they would keep it to themselves.

Mr. McCARTHY: Nonsense. Objected to as immaterial.

The COURT: Yes; I don't think it amounts to as much.

After the flood of 1921, I was an officer of the Commercial Club. I was also an officer of the Town of Wibaux; I was Town Clerk. And I was Secretary of the Commercial Club. As to matters that came up in the Town Council with reference to flood conditions and a bridge of the Northern Pacific there, will say that after the 1921 flood, our council at various times discussed in a very informal manner the cause of securing some opening that would relieve us from apparent, at least—flood conditions. As a result of informal conversation of the council meetings and the Commercial Club, I was instructed in a very informal manner



(Testimony of Charles E. White.)

to write to the railroad company asking that something be done in that particular respect. I wrote the letter as instructed, or [100] rather, as suggested. I haven't a copy of that letter that I wrote. A copy of it was available to me among the records of the city, but it was washed out amongst the other numerous things, from the place in which my basement was located,—I should say within about three months after the 1921 flood. My basement, with papers, was filled with mud. I sent the communication from the Commercial Club and from the Town, to Mr. Sloan, the division superintendent, as we understood it at that time. His headquarters were at Glendive.

Cross Examination:

(By Mr. McCarthy).

My newspaper office is in the basement of the First National Bank Building. I have been located at that present location close to twenty years.

Q. So that during all this time you were worrying about floods, you continued to keep your place of business in the basement?

Mr. MAURY: I must object. It has been ruled in these cases that people can rely on things being fixed up, and the fact that a railroad company is negligent in the matter of a bridge, cannot in anywise interfere with the use of peoples' property, unless they condemn it and pay for it. This was their land and they could use it as they wish, and they couldn't be driven out of town by the fact that



(Testimony of Charles E. White.)

a railway company would continue to be negligent.

\* \* \* \*

The COURT: I don't quite see the point you are trying to make out of it.

Mr. McCARTHY: All right; we will ask a question.

Q. Mr. White, did you write an article in your paper shortly after the flood?

A. I did.

Q. Describing the flood conditions?

A. I did.

Q. And in your article you didn't say a word about—— [101]

Mr. MAURY: Just a moment. The article itself is the best evidence.

Having been shown defendant's exhibit "C", that is a copy of my paper—the first issue published by me after the flood.

Q. Now, will you point out in that paper one word where you suggested that the railway company was in any way responsible for this flood?

Mr. MAURY: Just a moment. That is not proper cross-examination. He has the paper, and if he wants to introduce it in evidence, why that is another question. This is not a time to be arguing with a witness, and the question is improper. He can point out anything that Mr. White said in his article. If he said anything inconsistent, that goes to the jury; if he said anything consistent, that is here. Just point out anything you want Mr. White

(Testimony of Charles E. White.)

to identify, and if there is any inconsistency, we won't object.

The COURT: Refer to the article and show it to him. Let him look at it and ask him if he charged the Northern Pacific with any responsibility for the flood, and in his own words. That is as far as you can go, perhaps.

Mr. McCARTHY: All right. You heard the Court's suggestion, and I adopt it.

Q. Will you look at the article?

A. Yes, sir. I wrote the article.

Q. Now, Mr. White, did you in your paper, charge the Northern Pacific with any responsibility?

Mr. MAURY: The paper is the best evidence.

Mr. McCARTHY: All right. We offer defendant's "C".

Mr. MAURY: Objected to, except as to a particular article, which can be put before the jury and read to the jury; and we want that article read. [102]

Mr. McCARTHY: If the Court please, it is our theory—we contend there is not a word in this paper suggesting any responsibility on the part of the railway company.

The COURT: I don't see what you are getting at with it anyway; if you want to introduce that article for that purpose, that article may go in. I will admit it for the purpose you have stated.

Mr. McCARTHY: All right; I will read it if the Court please.

(Testimony of Charles E. White.)

Q. Are the headings a part of the article?

A. They are, but not mine, because the paper was printed in Glendive. The article begins right here (indicating), "On Thursday night"—

(Article in defendant's Exhibit "C" read to the jury by Mr. McCarthy).

The defendant's exhibit "C" is dated June 13, 1929; the next issue of my paper would be seven days later. You misunderstand Mr. McCarthy—

Mr. MAURY: When was the next issue published? We want to interpose objections here.

Q. I show you defendant's "B" and ask you if that is the first issue of your paper after defendant's "C"?

A. This (defendant's "C") was the first publication after the flood, and I think that after defendant's "C" came out, defendant's exhibit "B" was the next issue of my paper.

Q. Mr. White, in defendant's "B", in any place in your paper, did you suggest, intimate, or charge the Northern Pacific Railway Company with any responsibility in connection with the flood or the damage resulting from it?

Mr. MAURY: Objected to as attempting to confuse the issue and in no way tends to dispute or contradict the witness.

The COURT: If there is anything in that article [103] contrary to what he testified to on the stand, I expect you will have to submit the article.

Mr. McCARTHY: My point is, if the Court

(Testimony of Charles E. White.)

please, it is silent; it is the silence of the exhibit. It was silent as to any responsibility of the Northern Pacific——

The COURT: Well, introduce it.

Mr. McCARTHY: Defendant's exhibit B is offered.

Mr. MAURY: We object to it as encumbering the record, and too remote one way or the other.

The COURT: It seems to me you might look at these papers and introduce such portion of them. Of course, your position is—well, go ahead and read it to the jury, if you claim it contradicts anything he said on the stand, or if it is inconsistent with anything he said on the stand.

Mr. McCARTHY: My position is, it fails to make any charge against the railway company, and there is no charge of any kind in it—in any part of it. Well, it is offered for the purpose which I mentioned.

The COURT: Of course, I can't see any purpose at all. The fact that you say there isn't anything,—the jury might see something that you don't see. If you are going to introduce it, you better read it.

Q. Mr. White, will you indicate in that article

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Mr. MAURY: We object to that—there are six or eight pages in it.

The COURT: How many papers have you got you propose to introduce?



(Testimony of Charles E. White.)

Mr. McCARTHY: What I will do, I will have this checked and see if there are any articles we want to read.

The COURT: Very well. If this witness has said anything that you think is contradictory to his utterances [104] on the stand, I think you will have a right to call it to his attention. But the mere fact that he doesn't say anything, that is for you to argue. All right, proceed Mr. McCarthy.

Q. Now, Mr. White, where did these rolls of water you speak of come from and where did they go?

A. They came from the backing up of the stream at the railroad dam running to the south and meeting with the main current, and as I stated before, there is an apparent ravine, which forms a tributary to the main stream of Beaver Creek.

Q. You think it was these rolls you described that took the Methodist church off its foundation, is that right?

A. I presume a certain amount of license is permitted in newspaper accounts of—I was there,—testing the currents and looking after the people there,—and it was these rolls of water I mentioned that knocked the Methodist parsonage off its foundation. The Methodist parsonage was lifted off of its foundation and carried east on to the south-east corner of Dahl's blacksmith shop, then deflecting itself into the main current of the stream, going on down past the wagon bridge.

(Testimony of Charles E. White.)

Q. And there were countless directions, Mr. White, the rolls of water were moving from the north to the south?

A. From the north to the south and south to the north; from the south to the north and the north to the south. But the house moved from the south to the north; it moved from the south to the east first, also. Pointing it out: here is your Methodist parsonage,—this water rolled—After it came to rest, it was right down near the depot. The depot is way down here near the railroad water tank,—at least several feet from the main entryway,—but it was up on the railroad embankment. The railroad embankment is north of the site of the Methodist church and where the parsonage was before it was taken off its foundation and moved away. [105]

Redirect Examination: (By Mr. Maury).

That “narrow get-away” mentioned in the article which was read, was the railroad bridge and the viaduct.

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S. P. RIFE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Colton).

My name is S. P. Rife. I live at Miles City, Montana; have lived at Miles City 5 years and 9

(Testimony of S. P. Rife.)

months. I lived at Wibaux before I went to Miles City. I lived at Wibaux about 17 years, in the town.

I was in Wibaux during the month of June, 1921. There was a rain occurred at that time; that rain occurred about 2:00 o'clock in the afternoon. At that time there was a cloud come up from the southwest and it didn't look like it was going to be much of a cloud, and it assembled into a hard rain and it rained for about 30 minutes and it quit altogether and it gave me time to get home, and it started in a downpour and rained hard, steady downpour for two hours—rain and hail. During the first 30 minutes while it was raining, I was called by one of the men I was in business with, to come out and see what was going on, and by that time the water was coming in over the creek banks five or six inches, rolling in over the creek banks, on both sides of the creek, but where we could see it the plainest was on the east side of the creek; and it continued to come in like that during the length of the time it rained for about two hours, and it kept on raising and kept on raising until it came up to my house. My house was located right in there (indicating on relief map),—right in that corner (that is west of Wibaux Street and north of Second Avenue South, and the first little house there on the corner). That house stands on a foundation probably one foot from the ground. [106] and it just got up to run into the basement and just started to run into the basement when the



(Testimony of S. P. Rife.)

water started to recede. During that flood of 1921, as to how far north on Wibaux Street from the creek the water got, it just come to the Crescent Hardware store right on Wibaux Street. During the 1921 flood, it covered practically all of the town west of the creek and south of the railroad bridge and about half of the town east of the Beaver Creek and south of the railroad.

Q. And how much of the town was clear in water and describe to the jury on this plat?

A. Well, this was my place of business at that time; it was supposed to be in that building there; that building is just north of the south—north of Second Avenue South and west of Wibaux Street. Here is the street coming in from the east; here is the Crescent Hardware store; this is supposed to be the Drake building. The water come clear down to this corner here, say to 20 feet, then it went in through there. From the intersection of First Avenue South and Wibaux Street, north to the intersection of Wibaux Street and Orgain there wasn't any water. Water conditions to the west of Wibaux Street: this water that came in by my place, part of it came in there; the other part flowed through a swale here by these buildings. Those buildings are,—well, Mr. Paulson lived in one of these houses here, and one of these is the Kinney house and that street comes right in through there and then it comes down through this swale here; this was the Thompson barn. The Thompson barn is north of Second Avenue South and east of E



(Testimony of S. P. Rife.)

Street; the water would come right down through there and through here and meet here, and come out here by the Orgain building and come up to the railway and down this way,—going north to the railroad track and turn east on the south side of the railroad track, to the viaduct. But there was no water from this place to there, but this practically——

Mr. HALL: From Orgain Street down to the Crescent [107] Hardware Company?

A. Yes, sir.

I was not over in the Davis Addition during the evening of the flood of 1921.

After this water raised,—well, I see the water raising and still coming up, and I wanted to know the conditions and what might happen in case I would have to move, because the water was raising so fast, and I went over to my place of business and I seen the water coming to the floor, and I went to the railroad bridge to see what chance—to see about the water getting through there, and to see if there was anything to block it,—to dam the passageway, and I went to the viaduct and to the depot and down to the railroad bridge. When I was down to the railroad bridge, I observed it was just about the capacity of the railroad bridge; it couldn't go through there and it was banked up on the south side and unable to go through there. I noticed some poles and bridge plank go through the bridge that evening. Those poles come downstream and as they entered the railroad bridge, as you would describe

(Testimony of S. P. Rife.)

it, they would come down and dip down and fly up, and then they would come up below the railroad probably 150 or 200 feet. The difference between the depth of the water on the south side of the railroad embankment and the north side, there was a big difference, but it was pretty hard to judge, looking at it straight down, but I should judge about 6 or 7 feet higher on the south side than it was on the north side.

Having been handed plaintiff's exhibit 2, I know what that is.

Mr. McCARTHY: No objection.

I can't tell exactly the year, but there were several years that this occurred. That is a break-up in the spring, of the water—of the ice and the water jammed and flowed back, and the ice drifting back against the bank opposite my place of business and by Charlie Dahl's blacksmith shop. That place of business is two and a half blocks south from the railroad embankment. I can't say [108] exactly how often I have seen a scene like that in Wibaux, but possibly four or five different times during my stay in Wibaux. During those four or five times to which I just testified, the usual action of the water was to come downstream and when it couldn't get through at the opening at the railroad, it would whirl back and throw the ice back on the sides of the creek and dam back up; that is what shoved the ice back up in the road. I have seen those chunks of ice laying up by my place of business, but at this time, they were laying over on the bank, according to that picture. But I have seen them clear up in

(Testimony of S. P. Rife.)

the road in front of the blacksmith shop.

I am acquainted with a gentleman by the name of John Presthus at Wibaux. I couldn't tell you just when he came there—whether he came there after I did or before; I think after I came there. I located in the town of Wibaux proper in the spring of 1911, and I met Mr. Presthus probably two or three years afterwards,—I couldn't tell you when. He was working as section foreman for the Northern Pacific during all the time I knew him there; and he is still working, as far as I know.

In 1907 I was on a ranch about 30 miles southwest of Wibaux—mostly south. That year there was a similar rain and flood.

I was a member of the Town Council during 1923.

Q. I will hand you a book and ask you to tell us what this is?

Mr. McCARTHY: There is no question. That is the town meeting or minute book is it? We don't question the authenticity of the book, but we may have an objection as to the materiality of the matters there. There is no need of proving the book by the Town Clerk or anything of that kind.

Q. Were you present at a meeting—

A. I was.

Q. Held at Wibaux on the 7th day of March, 1923, in which your name appears as alderman there,—were you present at that meeting, [109] and particularly drawing your attention to the second to the last paragraph for the purpose of refreshing your recollection,—does what is said in that para-



(Testimony of S. P. Rife.)

graph to which that refers,—did that particular matter transpire? Were you present?

A. I was.

Q. And that particular matter did transpire?

A. Yes, sir.

Mr. McCARTHY: If the Court please, there is no objection to the particular part they speak of. There are matters contained in the book that we would object to. Now, if the part that Mr. Colton has in mind now can be drawn off by the reporter,——

The COURT: It is a part of a resolution adopted by the Town Council, is that it?

Mr. COLTON: I am just going to read the paragraph.

Mr. McCARTHY: All right.

Mr. COLTON: (reading) “The Clerk was then instructed to write to the Superintendent of the Railroad in this Division and see what could be done to carry off the flood water in the vicinity of the elevators.”

Q. Drawing your attention to a meeting of the Town Council held at Wibaux on April 3, 1923, and particularly drawing your attention to the fourth paragraph,—I am asking you to refresh your recollection and see if that did not transpire?

Mr. McCARTHY: Objected to as irrelevant and immaterial and having no bearing on any issue in this case and not in any way binding on the defendant, merely being a direction to the Clerk and nothing to show that it was ever carried out.



(Testimony of S. P. Rife.)

Mr. MAURY: The Clerk will be here in the morning.

The COURT: Perhaps you had better introduce it through the Clerk. Just as it stands, it wouldn't amount to anything because no direction was ever given—it wasn't carried out. [110]

Mr. MAURY: All right, we will have the clerk here tomorrow and present it again.

Immediately following the 1921 flood, I attended a meeting where certain officials of the Northern Pacific were present. That meeting was held in the Commercial Club rooms at Wibaux, Montana.

Q. State who the gentlemen were who were there at that time?

A. It is a long time to refresh your memory, being called on short notice, as we were at that time,—I wouldn't attempt to state who were there at that time, but I have a faint recollection of the description of the man. At that time, or now, I wouldn't swear as to their person. But I can give the description——

Mr. McCARTHY: Well, we object to any evidence being received here as men purporting to represent the Northern Pacific as not binding on us. We don't know who they were; we don't know whether they had any connection or not.

The COURT: He ought to identify some one of the group.

Q. What was the purpose of that meeting?

A. The purpose of that meeting was to ask the Northern Pacific if they wouldn't lengthen the

(Testimony of S. P. Rife.)

bridge across the railroad, and repair or fix the viaduct as they put it in in 1912.

Q. And was that matter discussed at that meeting?

A. It was.

Mr. McCARTHY: Objected to as immaterial as far as we are concerned.

The COURT: Yes; you haven't laid much of a foundation here for a meeting that would warrant the introduction of testimony along this line,—without showing when and where and who was present. I will sustain the objection, if you can't tell us more than that about it.

Cross Examination:

(By Mr. McCarthy).

The county bridge is located south of the railroad [111] embankment, and west—slightly to the west. I don't know exactly when the foot bridge was put in that is shown here on the relief map. There was a cinder walk along there for a number of years and then they put that in,—I don't know what year. It was after the high water that the people couldn't get across to the foot bridge there, that they put that up. If any ice blocks were thrown up on the land in the vicinity of Dahl's blacksmith shop, or in that general locality immediately to the east of Wibaux Street and South of First Avenue South, those ice blocks would not be blocked by the county bridge before they would be blocked by the railroad track, because when ice would first break up, it would break at the railroad bridge and then

(Testimony of S. P. Rife.)

float in under until the water got so high, it would float back by the Orgain Building and in the vicinity of the depot, and then it would continue until it got blocked back to Massey's place and my place. My theory is it was blocked upstream from there——

Q. Your theory is it was blocked upstream from there? It was not ice coming downstream?

A. That is what it was. When it was just ordinary, it could go in under. When it got too much,—it got so much, it would flow sideways and leave a current in there and the ice would shove back from the railroad bridge to the low land.

Q. Wasn't that due to a dam in there?

A. There was a dam in there for a number of years and it was finally blown out, and it couldn't get through there. That probably, is what caused this ice—because the dam was there and creating deeper water.

Redirect Examination:

(By Mr. Colton).

I have seen ice jams there since the dam was blown out; any year there is sufficient water in the creek to make ice, there is an ice jam. I couldn't say when it was blown out—whether 1915 or 1916; I think it was the spring of 1916 when the dam was blown out. During the early days when those ice jams were there, [112] I noticed a young fellow riding on ice cakes. The creek would raise, as I stated before, and the ice would float back to the

(Testimony of S. P. Rife.)

banks and there would be finally, a channel running through. There was a young fellow that kept walking out on this ice and he would jump onto this ice and go down the current and as it passed the railroad bridge, he would grab up and jump off onto the railroad bridge, until he finally fell in the water and he quit. The ground east from the county bridge towards the elevators is low; it is possibly four feet lower than the bridge.

Recross Examination:

(By Mr. McCarthy).

After this letter was written to the railway company about the water around the elevators there, the railway company put in several culverts in the elevator-side track there, to take care of the situation.

(By Mr. Maury).

I have seen those culverts—the culverts that were put in there. I don't recall whether the culvert to the east was lower down in its bed than the culvert to the west.

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ARTHUR BARCLAY,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I have lived in Wibaux County and near the town of Wibaux since 1909. In 1921 I was county sheriff. I recall a high-water at Wibaux in that year. The



(Testimony of Arthur Barclay.)

rain fell about 2:00 o'clock or 2:10 in the afternoon. I know where the Davis Addition is. I was on the west side of town when the water fell, that is west of the creek and south of the railroad, up on the hill. I went over into the Davis Addition that afternoon. I went over part way on a truck. I could cross the county [113] bridge, when I went over. \* We went through Main Street here on a truck and over this way across the bridge and down this street, and when we got down to about this point, right here, we got off from that truck and we stopped there to relieve some people—went to this next corner right here; I and a fellow by the name of Frank Berry walked over here——

Mr. HALL: What street is that?

Mr. MAURY: Alice Street—to the east.

And we helped some people out right here——

Mr. HALL: That is the junction of Alice and what?

Alice and Bushman. Here is Harry True's residence at this corner. The water there was up to our waists; and the fellow was shorter than I,—he slipped and went out of sight. And after helping these people, we went over to this house (indicating the extreme northeasterly house in the Davis Addition, and south of Alice Street, west of Regina), and I carried two ladies out of this house. The water there was up to my waist. As to how long the water stood at that depth: well, we got these people out of this house and went up this alley and

(Testimony of Arthur Barclay.)

got a few more out, and then I left there—I don't know just how long,—it was up high all afternoon, and then I came over to the railroad bridge; this is the railroad bridge here. As I crossed the railroad bridge, the water was high and it was ducking in under the bridge—that is, timbers and things like that, that came. I could observe a difference in the height of the water to the north of the bridge and the water to the south,—well, of course, somewhere south of the bridge,—early in the afternoon, it was quite a bit higher, but late in the evening it got up, because there was an awful flow of water came on the north side of the bridge; late in the evening, there was water on the north side—it come down on the north side.

I lived right in town, but my farm is six miles east,—south- [114] east of Wibaux. During that flood of 1921 the railroad tracks near the elevators were washed out and ties set up on end. Those tracks were washed in both directions there; they were washed—in some places, it was twisted up this way and other places, that way.

Q. By “this way” and “that way”, would you say parts of them were washed away from the railroad embankment and parts washed towards it, or how?

A. Yes, sir.

Q. Is that the thing you intended to convey?

A. Both ways, yes.

(Testimony of Arthur Barclay.)

As to how much of the passing-track or side-track there was washed away in 1921,—well, that switch was pretty well cleaned out there; I don't know just how many feet it would be. In that flood of 1921, there was a washout right at the east end of the bridge. At the east end of the bridge during that flood, that tore quite a bank off of it,—and a light pole, and there was quite a bit of water—quite a bit of dirt taken away there where the water collided; you see the water coming down on the north side of the track and this coming through here, it tore out——

Q. About how many feet long would you say that was that was torn out of the railroad east of the bridge in 1921?

A. I wouldn't—I don't know—probably twelve or fifteen feet, something like that.

Q. Now, from there on east to your ranch house, what happened in 1921 to that railroad?

Mr. McCARTHY: Objected to as being immaterial, if the Court please, not having any bearing on Beaver Creek, or the bridge over Beaver Creek, as to what happened six miles east.

Mr. MAURY: We intend to show the intensity of the flood.

The COURT: I think so; overrule the objection.

Mr. McCARTHY: Exception.

A. Right up on the hill beyond the stockyards, there is a draw there and water came through there, it softened the track and [115] washed it out, and



(Testimony of Arthur Barclay.)

an engine tipped over; and east of the crossing, one mile east of town, the track was washed out there three or four places between there and Yates. Yates is about five miles east of Wibaux.

Q. And washed out in three or four places. Describe how far the rails were moved from their previous position?

Mr. McCARTHY: May it be understood that the objection, ruling and exception, may apply to this entire line of testimony?

The COURT: Yes.

There was one place that the rails were clear out in the highway, they were north of the track; the track was broken and the rails were clear out in the highway. I would judge those rails were washed from the railroad bed 150 feet—150 feet from where they had been before—from the main track.

I know approximately the contour of the watershed of Possum Hollow. There is about 550 or 600 acres maybe, in that watershed. I have seen water coming from Possum Hollow and striking towards Beaver Creek a good many times. The course or courses that it takes after it gets to the Davis Addition, it comes down this way, and I seen it go that way too. Instead of "this way", I am taking the ruler and showing the court, jury and counsel. I have seen water just south of town here, it comes down through here, through here; and I have seen it go down this way too—right through here.



(Testimony of Arthur Barclay.)

Mr. MAURY: Indicating a line—Who lives in these houses here where you indicated the course that you have seen it take? Do you know who lives there?

A. I don't know whose house is there.

Q. Well, have you seen it take a course through these five little houses to the west of Drake Street and to the south of Olive Avenue? This is Olive Avenue; there is Drake Street. [116]

A. Right through here (indicating), I have seen water.

Q. You have seen water back up?

A. I have seen water from the stream come down and go right through here in the Davis Addition—before it can go through there; before it is high here.

Q. Now, this other water course from Possum Hollow——

A. Right south of town there, I have seen water come in this way, as well as this way from Possum Hollow.

Q. And the one “this way” goes toward the word “Drake” on the plat? Is that the course you wish to——

A. Yes; right in thru here.

Q. Yes. Towards the word “Drake”. And how deep have you seen it come down Drake Street from that point over at Possum Hollow? (You may sit down now.)

A. I don't recall just how deep I have seen it. I have seen it go through that way several times;

(Testimony of Arthur Barclay.)

and in high water, I have seen high water go through the other way to the Davis Addition—water that came right down the main stream.

In going from my office in town or from my home in town, to my ranch, while I was Sheriff, I went over the county bridge,—the county road. As to the condition of water standing on the road between the county bridge and the elevators that I have seen in the springtime,—will say that I have often seen—I have had to wait several times for the water to recede a little driving through there; any time there was high water, we have had to do that. I don't remember just what years I have seen that, but any time we have had high water. I have often seen ice cakes right on the highway there—lots of times.

Q. And what would be the condition of the surface of that water between that point that you describe, or those points, and the railroad embankment?

A. I don't quite understand you.

Q. Rough or smooth? Flowing fast or stagnant?

A. Well I have often seen the water come down there a pretty good speed, and I have seen it when it wasn't a good speed. The water, when that [117] comes down there and fills up, the speed isn't as great then. As to how often I have seen it fill up there before 1929,—well, the 1921, and different floods in the spring; I couldn't just tell how many times, but a great many times. In the spring of

(Testimony of Arthur Barclay.)

1919. In 1919, we had quite a lot of trouble with water there. We did down to the Brophy bridge too, with ice going out.

Q. How long did the water stand there in 1919, if it did stand there?

A. Well, if the ice run out of a sudden, it would come down and pile up there on both sides of the bridge, and the water would recede and ice would be on the banks.

In plaintiff's exhibit 2 appears a high building. That is the Wibaux County courthouse. I think it was in December, in 1919, that that building burned down.

#### Cross Examination

(By Mr. McCarthy).

In 1921, when this rainstorm came in Wibaux, it rained very hard. It rained in the general vicinity of Wibaux; of course, the storm wasn't confined to the city limits of Wibaux; I think the storm came up from the southwest—the clouds came up from the southwest, but the bulk of the storm hit east I think. Rain fell over on the cemetery hill, some,—and over in the vicinity of the Wibaux monument—well, not very much west of there, I don't think. The rain was heavier on the east,—the south and east—side of town than it was on the west side of town. Whatever rain there was falling over there on the hill towards the cemetery would

(Testimony of Arthur Barclay.)

naturally run down towards the town, and what rain there was in the east, falling in the drainage area of Possum Hollow, would pour down through Possum Hollow; it drained all it could; it drained all through there. As I came over into the Davis Addition, after getting off of the wagon that I came on and proceeded east and south, I found the water getting deeper and deeper as I went along. [118]

Q. In other words, the further away you got from the creek, the deeper the water?

A. Well, the more time we gave it, the deeper it got, yes, sir. As I went away from the creek, the further I went, the deeper the water got—for a time.

Q. And you were convinced, weren't you Mr. Barclay, that the difficulty you found with the people over in the Davis Addition was due to water from Possum Hollow and those sidehills?

A. Well, Beaver Creek was full.

(Question repeated):

A. No, sir; not wholly convinced.

Q. Mr. Barclay, I show you a certified copy of a portion of your evidence given on page 3176, case No. 2444, in the District Court of Fallon County, tried at Baker, Montana, on the 6th of January, 1934, calling your attention to the question and answer at the bottom of page 1, and ask you to read that?

A. Yes, sir; do you want me to read it out loud?  
“Q. The difficulty you found with people over in the Davis Addition was due to water over in Possum Hollow? Answer: Yes, sir.”



(Testimony of Arthur Barclay.)

Q. That was your testimony at that time?

A. I expect I testified to that; yes, sir.

When this water came down from Possum Hollow, I told you this morning, that some of it ran in one direction and some of it ran towards the elevators. I have seen it do that. Looking at the relief map, I see natural depressions in the ground are indicated—the natural depressions in the ground indicated here on the relief map, it shows a path that would carry water right down towards the elevators,—that is the direction as near as I can remember, although there is a deeper one over that way, I think, than what shows there.

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R. V. MASSEY,

being first duly sworn as a witness in behalf of the plaintiff, testified: [119]

Direct Examination

(By Mr. Maury).

I moved to the place where I was living on June 7, 1929, in the fall—October, 1924.

Q. Where is that place on this profile?

A. Do you want me to show it? You are pointing to it. That is where my buildings are.

Mr. MAURY: I call it a profile. That is our language.

(Testimony of R. V. Massey.)

Mr. McCARTHY: Just so the record is clear. He is pointing to the exhibit that is introduced here as a relief map.

The COURT: Very well.

Q. On this profile, am I pointing to your buildings?

A. Yes, sir. My house on this profile (witness measuring) from the extreme south end of the map—that is, to this edge of the profile, measures 20 inches.

On June 7, 1929, I was at home. The morning of the 7th I was awakened by an airplane, about 5:00 o'clock. I got up. At that time, Beaver Creek was very high and of course, I was interested in my stock that was in my pasture and I proceeded to get my stock out of the pasture because they was in water. I recall a cutbank here, and marks on the cutbank at that time, which would aid me in telling the jury how high the water was when I got up. I noticed the cutbank on the southeast of my house along the creek, had a strip between the surface and the clay there—there was kind of a strip there, about two or two and a half feet, and the water was about that high at that time, from the top,—within just about two to two and a half feet of the rim of the bank. That cutbank is right in that vicinity where you are pointing. The stream has moved since then; it has moved west. On June 7, 1929, I would say the stream was at the point you are now indicating—a curve to the southeast of my house. [120]

(Testimony of R. V. Massey.)

As to how the water looked across the flat at that time, south of my house and west of my house, it was very high and covered all the lower portions of it. We then proceeded to get our cattle out of our pasture and take care of things that we could there. My horses at that time, were standing northwest of our buildings, scattered out kind of on low spots there at that time when I got up. I had ten head of work horses and two colts,—one sucking-colt and one two-year-old colt. Pointing out with the ruler where those horses stood or moved around during the entire period of the flood in Wibaux on June 7, 1929, will state that northwest of our house there is kind of a high spot of land, and they gradually got to the high point on there on the north side,—I should judge in there (indicating). It took about one hour from the time we got up in the morning until they was on that island.

Q. After the waters receded in Wibaux, where were those horses?

A. They were still on the island the next day—the next forenoon. The sucking-colt was all right. The depth that the water got on the legs of those animals, I should judge it was about half way to their stomachs; perhaps a foot and a half high, or maybe a little better.

From our residence that day, we went up on the hill as soon as the water began to come over the bank between the house and the road. Some of the water came over a low place between our house and the road,—you take southeast of our house, the



(Testimony of R. V. Massey.)

water began to come over about 6:00 in the morning and we proceeded to the hills. My son was there in the house besides Mrs. Massey and I; he went with us. As to our vision from the hill where we went to, all during that morning,—we could see all over our place practically; and we was watching our horses on the island to see what was going to happen. We figured they probably would leave there and get tangled up in some wire or something and get drowned. We left at our house, and around it,—well, we had quite [121] a bunch of little chickens, perhaps 175 I think, to be correct, that was parked around in boxes around our house, outdoors, out in coops; they was on the ground, sitting on the ground. When we came back, after the water had receded at Wibaux, our chickens were all right. No water got in our house. At about 3:00 o'clock in the afternoon, the height of the water still running in the creek near the point where I had observed it in the morning,—I should judge it was right close to about what it was when I got up in the morning—about that. It kept receding from that time on, of course. As to the height of the water the evening of the 7th, about bed-time, it was perhaps down a couple foot below,—about four or five feet lower on the bank than what it was about noon or sometime around there. The water receded from the ground from our house, I should judge between 11:00 and 12:00 o'clock we walked home from the hill and the road was dry there.



(Testimony of R. V. Massey.)

Afterwards, I pointed out the high-water marks to Mr. R. A. Lyman across the creek opposite, west of my house. When I pointed them out, I think those marks were still observable to anyone who knew where to look for them; they are observable yet, I think.

Q. There are still enough of the vestiges for anyone to go there and find them,—I wouldn't say as to the exact height, but there is evidence there to show how high the water was. I never pointed out those marks to Mr. Oien. He never was pointed out those marks that I know of, by myself or by any of my family; he never requested me to give him the marks. He has requested me to show where the horses and colts stood on that day; they asked me if I would show them where the horses stood on that island, and as near as I could, I pointed out that spot to Mr. Oien.

I didn't observe no wall of water that morning. There was not very much of the time after I got up at 5:00 o'clock that my attention was not directed towards the river.

Q. Could there have been any such phenomena as a wall of water [122] passing your place without you having seen it?

Mr. McCARTHY: Objected to as calling for a conclusion of the witness. He can tell what he saw and what he didn't see.

The COURT: Yes.

Describing how much attention I was paying to the river there from 5:00 in the morning until I

(Testimony of R. V. Massey.)

returned to my house in the afternoon,—well, of course, we was very much interested in what was happening and we kept very close watch to see whether our buildings were going to go and whether our horses were going to be washed out, and we was pretty much excited over it—in regard to what was going to happen,—and we watched it closely all the time. It was, of course, broad daylight when I got up. As to when daylight comes (for the purpose of the record) the first week in June,—it was good and light so we could see everything. I think the sun was up—I am not sure—but I think it was. As to how long the water stayed, standing at the high-water marks that I showed Mr. Lyman, it was sometime—perhaps 7:00 or 8:00 o'clock. The reason I am saying this, there was at our gate post was about a foot and a half of water at the high time; that happened sometime between 8:00 and 9:00 o'clock—in front of our house and between where he was on the hill. That went down once and then came up perhaps a little bit higher. I couldn't say how much difference there was in those two rises, but perhaps a couple inches or so. I should judge the second raise come perhaps 10:00 o'clock or such a matter—maybe a little more.

We could see the railroad bridge from where we were at, and from my house too. My house from the railroad bridge, in a direct line straight across, it is probably a little better than half a mile, perhaps close to three-quarters of a mile. I don't know exactly, as you could see the county bridge from

(Testimony of R. V. Massey.)

my house or not; you might see the top of it a little,—that is about all. [123]

Q. Mr. Massey, did some member of your family take a picture of the flood of 1921,—a photograph—an old photograph? I am calling your attention to plaintiff's exhibit "X".

A. Well, now, that might have been taken by some of our family, but I don't remember it; it was in our house there; for how long I couldn't say.

Cross Examination:

(By Mr. McCarthy).

It was in October, 1924, that I moved on there to my present place,—residence. Mr. T. H. Rush lived there before me; his first name is Tom. From 1924—from the time I moved in on this farm or ranch—until June 7, 1929, I had never seen any water that high up around my place like this before. In 1929, on June 7th, I got up in the morning and the creek was rising, and it kept on rising until I thought that in the interests of safety of myself and family, I had better get to higher ground, and I went across the road directly east practically, to that high ground as shown on this relief map. While I stood around there that morning, I continued to watch the water. The water was flowing. Of course, there was plenty of debris in the water that morning going down toward Wibaux; that would be, generally speaking, in a northerly direction. As to what were some of the articles or animals or debris that I saw,—there was one in particular,—a



(Testimony of R. V. Massey.)

jack-rabbit that come down, that was in the stream; I seen something moving its ears up and down and I seen it was a jack-rabbit; it was still alive and he would float two or three rod and his ears would come up. The jack-rabbit was going with the current. The current was going in a northerly direction.

Q. Can you take the pointer here, Mr. Massey, and run a line from your house towards whatever direction the water was going?

A. You see the city water tower here that I am referring to,—and this is the Senator Kinney house; this is the church here. It was [124] going, perhaps the main stream was hitting in right in west of my buildings there, and hitting just probably that direction, as near as I can figure it out. As near as I can figure, the force of the current was striking about half way, approximately, between the city water tank and the Miller house,—somewhere about in there; that is about as near as I can figure it out. The Miller house is the house to which you are pointing, previously identified in the record. The city water tank is this building here,—closely resembles the city water tank. The force of the water, as I saw it, was striking somewhere half way between those two points,—I should judge that would be it.

I did have a cow barn at my place. That is shown on the map by a white line here on the edge of the bank south of my house.



(Testimony of R. V. Massey.)

Q. Prior to June 7, 1929, did you ever have any water in that cow barn?

A. None until—not to speak of—no, I don't know as there ever was any water in there; there never was any water in there that I remember of, until June 7th. The water got in that cow barn June 7th, clear to the top. The top of the cow barn is level with the soil—level with the ground.

This water I spoke of, I would describe it as moving quite rapidly. From watching the debris and jack-rabbit and other articles being carried down in that water, whether I could give you any idea how fast the stream was flowing,—that would be pretty hard to estimate I suppose; I couldn't say just how fast, but it was moving quite fast. I would think that it would be going faster than a man would ordinarily walk.

On the morning of June 7th until nightfall—that night at any time—I didn't see any water backing up at my place. It continued to flow at all times, generally speaking, in a northerly direction. The speed or velocity of the stream might have changed some during the day. But at any rate, throughout that entire day of June 7th, there never was a time around my place that I saw the water [125] standing still or backing up,—not a particle; it was flowing at all times, and flowing, generally speaking, in a northerly direction.

Q. Mr. Massey, you said you didn't see any wall of water there that day on June 7th. Did you hear any talk?

(Testimony of R. V. Massey.)

Mr. MAURY: We object as not material—any talk around.

The COURT: I think that is indefinite. Where? By whom? In whose presence?

Q. Were you in Wibaux,—in town, the day of June 7th?

A. I went down to the railroad bridge perhaps about 2:00 in the afternoon, and someone told me——

Mr. MAURY: We object.

Q. Did you talk with some farmer while you were down in the general vicinity of the railroad bridge?

Mr. MAURY: We object as not material.

The COURT: Sustained.

I spoke of a rise of water—water raising on the gate post and then a second raise. I should judge that the second raise took place, as near as I can remember, sometime around 10:00 o'clock—it might have been before and it might have been after; but it was around 10:00 o'clock I should judge. As to how much of a raise that second raise was,—it raised to about a foot and a half high on the gate post. Before the second raise—as to how much the water came up during that second raise above what it was before that, I should judge perhaps two or three inches. The first raise took place there between 6:00—it begin coming across our land there about 6:00 in the morning, and I should judge probably again at 7:00, or 7:00 or half-past, it was up perhaps a foot or more. The water went down once

(Testimony of R. V. Massey.)

in between 7:00 o'clock and 10:00 o'clock, but the exact time I couldn't say what time it was, but I should judge it to be somewhere in between those two times. [126]

My house sits on ground quite a little higher than the bottom of the creek, and my barn sits up on quite a high place. This island that I speak of, that my horses were on, that is ground that is higher than the surrounding land, and water got up on that island and it got up on the colt and on the horses. What I mean is that with this flood going on, an island was formed there that the horses took refuge on. Ordinarily, all that land in the vicinity of the so-called island is dry. The relief map here shows, generally speaking, the course of the stream after leaving my place, ordinarily. What I mean is, that the land all through here was covered with water at the time of the flood. The width across the water there west of my buildings was all of 600 feet. There was water in the road to the east of my buildings,—the road as indicated on the relief map by the brown or burnt sienna line, that is to the east of my buildings—I imagine that is what is supposed to be the road there,—indicates the road.

### Redirect Examination

(By Mr. Maury).

The speed of the water to the east of my buildings as compared with that in the river,—they both was running very swift. At the deepest point of



(Testimony of R. V. Massey.)

that water to the east of my buildings, I imagine it was probably a foot and a half deep. I never did measure the width of it, but it must have been, of course, around 150 to 200 feet. The cow barns beneath the bank are not in the same condition now that they were on June 7th.

After I got up that morning of June 7th there was no rain fell from the sky. As to how long it had been since there had been any rain at my place previous to the flood, will say that we had had considerable rain at that time, but just what periods I couldn't say, but the ground seemed to be pretty well saturated at that time; it had been saturated perhaps two or three weeks before the flood of June 7, 1929. During the time from 5:00 in [127] the morning until I got back to my home that afternoon, there was no rain falling. As to when it stopped raining that night and in the night of June 6th or early morning of the 7th, will say that my wife and child was at Beach that day and they didn't come home until 11:00 that night and I knew it was raining slightly when they come home. We didn't retire until about 12:00 and it was still raining some. When it ceased I couldn't say,—but none after 5:00 o'clock.

#### Recross Examination

(By Mr. McCarthy).

In June, 1929, there was a bridge over Beaver Creek to the south of my place,—about three-quarters of a mile I should judge, south of my buildings.



(Testimony of R. V. Massey.)

I couldn't see that bridge from the high ground that I took refuge on. There was a so-called yellow house in the general vicinity of the city water tank, and it was washed away, but, standing on the high ground where I was to the east of my place, I didn't see it go and I can't state what happened to it—any more than it was gone; I know the yellow house was there before the flood and that it was not there after the flood. I could give you a pretty good idea of where that yellow house was located—where it was before the flood. Pointing out on the relief map, this is the water station (indicating a small building directly to the south of the city water tank). Now, this yellow house you mentioned set on a bank, I should judge, approximately there; it is a little ways north of the creek there, (indicating). As to whether it would be fair to say it is approximately half way between the pumping station and the building directly to the right, or east of the pumping station, I will say that I think it was closer to this building here; I think it was more to the east—it might be; it is about southeast from the water tank. I do not know now where the yellow house was washed to,—I don't remember. [128]

Q. Mr. Massey, as you stood up there on the high ground to the east of your place on the day of June 7, 1929, and you saw this water moving along rapidly in the manner that you described, the main current striking where you have indicated, namely, half way between the city water tank and the so-called green house, or Mattie Miller house, could you see what

(Testimony of R. V. Massey.)

was happening to the water when it got down to the stream between the city water tank and the green house?

A. No, I couldn't tell what was happening down there; that was too far for us to get a real view of it to tell what was happening there,—any more than we might see water flop up or something like that. I did see water flop up; it flopped back in the stream I suppose; I could see little ripples, you know; I couldn't tell whether it was going over the bank towards the town there,—the distance.

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WILLIAM LENTZ,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Colton).

My name is William Lentz. On the morning of June 7, 1929, I was on the east side of the creek, due north of the bridge. My house doesn't appear on this profile or this relief map; it would be right off in there; that is straight north of the railroad embankment (indicating from the railroad bridge No. 184, straight north), beyond the edge of this profile. I should judge my house is about 400 yards north of the railroad bridge.

I got up at quarter past 4:00 the morning of June 7, 1929. It was the water in fact, that woke me up;

(Testimony of William Lentz.)

I could hear it roaring along there in the creek about 150 feet I suppose,—maybe a little more—east of the creek. The first thing I done when I got up was to go and get the car out of the garage and load up what I could and get up on high ground. I looked towards the [129] south, toward the railroad bridge, after I got up on the high ground. You can't see the railroad bridge from the house until you get up on this raise. Then I looked towards the bridge. \* I stood there on the raise; I had no other place to go. My wife went up too. Mr. Rourks and I stayed there and watched the water coming under the bridge and eventually, it closed off the view under the bridge altogether and it looked as though the water was running that way (indicating). When the opening at the bridge filled up, the water was like it was going over a fall; from where I stood, it looked to be 10 or 12 feet high, that is, from the bottom to the top of the water there under the bridge. I was looking from the north towards the south. I stayed there until the embankment went out on both sides; that was on the east and west side both. I couldn't tell you the exact time of day that was; I should think it was around 10:00 o'clock. At that time, around 10:00 o'clock, it looked to me to be about 30 or 40 feet of the embankment that went out. I couldn't tell exactly, on the west side, that was the first that went out. I couldn't see the east side from where I stood along there by Schuster's. After the embankment went



(Testimony of William Lentz.)

out, the water started to raise up on the north side.

Plaintiff's exhibit P-2 is a screen off of my west window in the front room; this is the top. Those streaks—there are certain rust marks on this piece of screen, this exhibit. Those marks is either the raise or the fall of the water on the level every time the bank went out,—that is all I can say, that is,—I should judge. That is all I can say; I don't know; it is according to the water's raise or the lowering of the water from the top when it got the full height. This piece of screen was facing the creek—facing the west. The 1921 water mark is not on there.

Mr. McCARTHY: Q. Is it your claim, Mr. Lentz, that these rust marks show different heights of the water [130] that occurred on the same day?

A. Yes, sir; and the water had never been up on that screen before or since, for I put them there; and the top mark of that corresponds with the water mark in the house at the present time—4 feet, 2 inches.

Q. Mr. Lentz, how do you explain that water would cause marks of this kind? Why wouldn't you figure that the entire screen would be discolored as high as the water got by the breaks in it?

A. That would be, I should judge, through the breaks in the bank; every time the bank would break out and part of the fill would go on the west side and east side, that would raise the water down there. The water couldn't get away on account of



(Testimony of William Lentz.)

the water ahead of it. The screen was up on my window like this, and I don't know how fast the water raised. It is my theory that at one time at least, there must have been water up to the top of this screen. I could not tell you or explain the difference between the clean spaces and what we call the rust spaces, but I have got pictures of the house—

Mr. HALL: Q. Mr. Lentz, you were not there until after the water went down were you?

A. I was within 150 or 200 feet while the flood was on, until the bank went out and the water started to recede.

Mr. McCARTHY: There is no objection; let it go in.

Mr. COLTON: It is offered in evidence. (P-2).

The COURT: It may be received.

I showed Mr. Lyman certain high-water marks there at my place.

Q. Showed them in 1929?

A. Yes, sir. I showed those marks honestly, truthfully and correct,—just the same as I did the other. [131]

Cross Examination:

(By Mr. McCarthy).

Q. You noticed on this exhibit—the screen—what we might call clean spaces in between the rust streaks, as you term it?

A. I don't know how they got there.

(Testimony of William Lentz.)

Q. I say, you noticed that?

A. Yes sir; I am a little hard of hearing. I noticed the clean spaces in between the brown or rust streaks. In fact, I know that the water came up to the top of that screen. I could not give you any explanation of why there would be rust streaks and clean breaks in between those rust streaks.

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Mr. JAMESON: In connection with the testimony of the witness White, we have now examined "B" and indicated all articles. I believe it was understood that after we had done so, we could read them to the jury.

Mr. MAURY: No; it was offered to the Court to see whether the Court would admit it or not. It is agreed that Charles E. White is still on the stand.

Mr. McCARTHY: The paper is in evidence now.

The COURT: Is it the contention that there was a variance between what he read and what he said?

Mr. McCARTHY: It is not so much what he said; it was what he failed to say in the article.

The COURT: I think that was admitted in evidence was it not?

Mr. MAURY: They are identified. This is a mere tendency to encumber the record.

Mr. JAMESON: This is offered merely for the purpose of showing that there is no charge or sug-

gestion of responsibility on the part of the Northern Pacific for the flood.

Mr. MAURY: That is not a proper way to contradict it in this Court. If he made any inconsistent statement, it should be [132] called to his attention, to the time and place.

The COURT: This is a different matter and it was called to his attention, and he admitted writing it, and that it refers to the matters he testified to on the stand—the flood of June 7, 1929. Well, it may be read to the jury.

Mr. MAURY: What portion do you want read?

Mr. JAMESON: I presume it would be necessary to read all of the article.

The COURT: I thought you gentlemen were going to look it over and find out what it was necessary to read. I can't see the materiality. There is probably a considerable amount of that.

Mr. JAMESON: That is true, if the Court please.

The COURT: Then why should you read it all, if it isn't necessary?

Mr. McCARTHY: We are willing to let the paper go in on the theory——

The COURT: Let the jury consider it, if they want to.

Mr. McCARTHY: All right; that is all we want.

Mr. JAMESON: We offer defendant's exhibit "B" in evidence.

Mr. MAURY: We object to it as entirely immaterial and not tending to prove anything at all,

and a mere encumbrance of the record about immaterial stuff,—not material to the case.

The COURT: The Court will allow the exhibits to go to the jury for examination.

Mr. MAURY: I was thinking that whatever is in, should be read.

The COURT: They will have the exhibit for examination.

Mr. MAURY: Will your Honor note our exception to the admission of those newspapers?

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DAN SUTHERLAND,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury). [133]

I have lived in Wibaux about 33 years,—since 1901. I recall the old Northern Pacific bridge as it existed around 1900 or 1901 at Wibaux. I recall an old dam that was built about 40 feet north, or downstream, from the bridge.

Q. Tell us what correspondence, if any there was, as you remember it, between the east wing of that dam and the natural bank of the stream that existed there? How did they correspond?—the east bank of the stream and the wing of a concrete dam that existed there?

A. The wing of the concrete dam ran parallel seemingly, with the original bank of the creek,—



(Testimony of Dan Sutherland.)

I should judge right against the bank. The width of the river-banks at the bridge as they first appeared to me when I went to Wibaux, I should judge was about 180 feet.

I recall a flood that took place there in 1921. As to how much of the town was covered by that flood,—all of the town on the south side of the railroad track and west of the creek; and also east to the elevators, and part of the Davis Addition, but I couldn't see that; and all that was left on the west side of town was about one and a half blocks of Main Street, or a little bit,—a block and a half of Main Street that wasn't covered with water. That block and a half that remained above water at that time, I would say that was Main Street from south of the viaduct on Main Street to the Wibaux Machine & Auto business. That is a little bit better than a block and a half of the street; then, going west from Main Street on First Avenue South. There was an island left around in this portion of town in 1921 (indicating), that was not under water.

Q. In the answer of the railroad here, a cement wall is spoken of. Who built that wall? \* Do you remember helping build a concrete or cement wall near Kinney's house?

A. Yes, sir. That was built about 1909 or 1910, I think. I may be off a year or two, but somewhere around there. That wall was built for protection from water there,—from water backing up, and

(Testimony of Dan Sutherland.)

water from coming over [134] the ground over the slough there. The water would start backing up from the bridge on the Northern Pacific Railway track down on Beaver Creek. I have seen that water back up from the railroad fill about seven times that I remember of, well; the first year was 1903, then 1906, 1909, 1912, that was caused from a break up of the ice in the spring; 1916, 1921 and 1929. Describing how that water would act when it backed up in those years,—of the times previous to 1921,—the opening at the bridge didn't seem to be large enough to take care of the water when we had a very heavy rain, and when it got to the bridge, it started damming up, and as it dammed up, it would run west towards the depot along parallel to the railroad track along the right-of-way; also, it would go east and southeast towards the elevators what you see there, and then turn south again over the county road (it is No. 10 road now), and up back towards the Mattie Miller house—the green house. The Mattie Miller house has been called the “green house”; that is it there. I have seen it, before 1921, back up from the fill to the Mattie Miller house, or beyond the Mattie Miller house, about two or three times that I have noticed myself, that it backed up there.

I was in Wibaux at the time when the viaduct was first cut under the railroad fill; I am not speaking about the concrete viaduct that is there now, but the first time that an entrance-way for teams or people was made under the railroad, in the railroad fill,—I remember when it was cut out; I don't

(Testimony of Dan Sutherland.)

remember exactly the year though. I think it was 1911 or 1912, I am not sure. It had wooden posts in it. The old wooden-post viaduct remained there until I think, 1929 or 1930, when they put in the new viaduct,—until after the flood of June 7, 1929.

I recall a visit of Mr. Rapelje to Wibaux. I knew Mr. Rapelje for quite a number of years previous to that time; I first met him in Glendive, Montana. After that, when I happened to be around [135] Glendive, I would usually meet him possibly once or twice a year. I don't know what position Mr. Rapelje held on the occasion of that visit to Wibaux,—the superintendent I think he was then, I could not be sure; superintendent of the Northern Pacific; I could not tell whether he was division superintendent or general. I never did know what Mr. Rapelje's first name was; just "Mr. Rapelje"; I was introduced to him as "Mr. Rapelje". The meeting took place I think, in 1921, and I was present there through Mr. Cullen as Mayor, advised a bunch of us that he was going through Wibaux and wanted to meet with a bunch of the business people in Wibaux to discuss some things that were wanted there in Wibaux. To start with, there was four or five of the citizens who met the superintendent, I should imagine. Before it was finished up, there must have been ten or twelve citizens there. Of the railroad officials present on behalf of the railroad company, so far as I remember, the only one I knew was Mr. Rapelje. There was supposed to be an engineer there, and some other parties, but I didn't



(Testimony of Dan Sutherland.)

know who they were. I could not tell you whether that engineer was Mr. Blum or Mr. Sloan, or who it was; I never paid any attention to them at the time. As to what conversation took place between Mr. Rapelje and other persons from Wibaux that met him,—the conversation started about an underpass or viaduct for the school children to go to school, to save them from going over the railroad tracks. That (indicating), was the underpass that was talked about at the time. That did not exist on that day—not at that time. That was talked about, and I understood the engineer, Mr. Fisher and Mr. Charles Dahl went up to find out where they wanted to put that viaduct. Mr. Rapelje stayed down with us and he went down with us to look at some piling underneath the viaduct that had been seemingly damaged, and after he looked the piling over,—anyway, it was taken up about us getting a new bridge over Beaver Creek, and he said that at that time there were plans in St. Paul, [136] were to raise the railroad track—I don't remember, it was five or eight feet—and that they wouldn't do nothing with that until they raised it, and when they did, they would give us a new bridge over Beaver Creek—a longer bridge—and also a new viaduct under Main Street. Joe D. Cullen was there at that time and when that conversation took place. There was never any new viaduct made there according to Mr. Rapelje's promise, before the flood of June 7, 1929. There was never any longer bridge made there before the flood of June 7, 1929.



(Testimony of Dan Sutherland.)

Q. What was the length, as near as you can recall, of the bridge there—the railroad bridge—from the time you went to Wibaux until the flood of June 7, 1929?

A. When I went to Wibaux first, there was an approach on each side of the bridge. By an “approach”, I mean there was an opening there between the piers of the bridge and the embankment. That opening on each side, as near as I recall, about a year or something after I went there—a year or two years—it was filled in with dirt and a very little riprapping done on it—not much—about four or five feet down on the bottom. It was filled in on those approaches from the base of the piers clear up to the top of the grade, on a slant. The filling in which I am speaking of on the 20-foot approaches, on each side, is correctly represented on plaintiff’s exhibit 4,—it is from this side here. This side don’t show,—yes it does too; it is the same thing; that is how it was filled in. It remained in that condition up until 1929.

On June 7, 1929, I got up about 5:00 in the morning. At that time, I was living on the north side of the track. About 6:00 o’clock in the morning, I got over or through the viaduct, or some way, to the south side of the track. Beaver Creek was pretty high at about 6:00 o’clock in the morning. By “pretty high”,—giving you something more definite,—it was starting to back the water from the bridge along the railroad track west towards the [137] depot. The flats southeast towards the eleva-

(Testimony of Dan Sutherland.)

tors was covered with water at that time too. As to the condition of Main Street in front of the plaintiff Nick Wagner's property,—I know where that was—at the time that I first saw it that morning, and when the water was coming along the fill to the depot as I described, there was no water on Main Street at that time; no water anywhere on Main Street.

I was in the oil business. That is the place right there. You are pointing to it,—on the railroad right-of-way, south and west of the viaduct,—north of Orgain Avenue and west of Wibaux Street. It was somewhere near 7:00 o'clock that morning when the water first come to that building; it come from the east. When the water got to that building from the east, Main Street, by the Wagner property was still dry. As to how long it remained dry after that water started coming from the east and got to my place of business, it was a little after 7:00 o'clock; I couldn't say; I never looked at no time that day. The part of Main Street that was covered with water first that morning was right across from the Fullerton Lumber Company, (that was the Dunham Lumber Company at that time), that was the first part filled up over towards between that and my place the water was coming from the east and coming around the building there,—both sides of the building,—between the lumber building and the depot and between the lumber building and the Orgain building. The depth as it came around there, as it

(Testimony of Dan Sutherland.)

appeared to be when I first saw it,—well, it naturally kept raising, and I should judge the longer it went, the deeper it got. The first water came around between the lumber yard and the right-of-way—that dropped through the viaduct, and when it started raising and over on the other side, it was coming across Main Street and by my place of business and down what you call to the slough and parallel with the railroad track, going west. It was sometime right after 7:00 or 7:00 o'clock sometime, [138] when I first noticed water coming from the west towards my place that morning; the both waters met at the west end of the slough. When they met, as to the condition of Wibaux Street near the plaintiff's property,—I started to go through with my car when the water met and when I came back, it was still dry on Main Street. I parked my car right across from my building in front of the Albert Pickering place on this corner (indicating); I faced my car south against the curb. It would be a little after 7:00 o'clock I should judge, or about 7:00, when I first saw water in the part of Main Street near Nick Wagner's property.

Q. Could you tell from whence that water came?

A. No, I could not say. I think it came first from down from the slough.

Mr. McCARTHY: Well, we object to what he thinks.

Q. Strike it out. Could you tell whence the water that was coming from the west to your business place came—where that come from?



(Testimony of Dan Sutherland.)

A. That came from the water tank down through what they call the slough, and it come down alongside the railroad track towards the viaduct. I could observe the little elevation here towards the Pierre Wibaux monument; there was no water coming from there. As to how long it had been since it had rained in Wibaux when I got up, there was no rain when I got up; when I got up at 5:00, the streets were wet, showing it had been raining in the nighttime, but there was no rain when I got up.

When the waters commenced to rise, I went into the Albert Pickering pool hall on the corner. I couldn't tell how long I remained there—possibly an hour or so; less than an hour. The water had raised slowly. I think the crest of the water was close to about 10:00 o'clock. A little previous to that, there was a recession—the water had gone down six or eight inches, or nine inches maybe, more or less. It stayed down for a little while and it started to come back, and came back again until it [139] came to the high point. From the water mark that I saw afterwards in my place of business, the high point that it raised to, I think on the floor of the warehouse was about eight foot two inches. I pointed out that mark to Mr. Oien, the engineer for the Northern Pacific Railway Company. After this flood, I don't remember whether he came around and asked for the information, but we was talking it over and I pointed it out; whether he asked for it, I don't remember. He made notes. I didn't point



(Testimony of Dan Sutherland.)

out any other water marks to him or to Lyman that I remember of. I pointed out correctly and truthfully to Mr. Oien what the water mark was in my place of business on June 7th.

I left the pool hall that morning. We were in the pool hall and a pool table there tipped over,—kind of tipped over on its side, and we was afraid the foundation had gone from the building and in place of that, it was the floor heaved; we didn't know that, but that was the reason we left. I went west to the Milton Hotel. That is the Milton Hotel you got your marker on right now—the fourth house from Wibaux Street, on Orgain Avenue and fronting towards the railroad fill. When I left the pool hall here, the water was coming up to about my waist here. I recall an incident of how we got through the front door. The door opened in and when we tried the door, we couldn't open it. The glass front in the door was much the same as this here, only a little higher up. It was jammed and I couldn't open it. We kicked our way out—kicked the glass out and went out. At that time, the water came to here (indicating waist) on me; that was between 8:00 and 8:30 o'clock.

The water raised slowly afterwards; I couldn't say how much it did raise after that. With reference to my automobile that I parked in the street there, it raised until just the top of the automobile was out of the water. I had an oil tank there and the hind end was floating around in the water.

(Testimony of Dan Sutherland.)

Q. Do you know where that tank lit finally? Came to earth again,— [140] the oil tank?

A. You are referring to my oil tank or Charlie Decker's? I saw Charlie Decker's oil tank floating around. It started from the south side of the Charlie Decker building on First Street, right down there; here is Charlie Decker's place here, north of my place here; his place is north of First Avenue South and west of E Street on the profile. That oil tank landed in here; I am pointing to the front of the Catholic rectory. It landed about 20 or 30 feet from the railroad fill, I should think. It remained there until after the flood,—I couldn't tell you how long afterwards. I recall where the Odd Fellows' building was; it was alongside of the Charlie Decker building. (That is the Charlie Decker building), on the west side. That appears to be the hall. It isn't still standing there; it was moved out of there the day of the flood. That building was moved to that place. Then on the day of the flood, it raised off of the foundation and it went a little north and turned right around—the south end turned north and hung up on a cedar post and that held it there until the water went down. As to how far it moved from its original position,—the lots are 50 feet long, and the south end of the building that turned around was practically on the line with the north end of the lots, right on the west side of the lot that the hall was on.

In 1921 the water came right through my feed barn and also blacksmith shop I had rented. My

(Testimony of Dan Sutherland.)

feed barn was right south of the Woodmen's Hall in that vacant space. You are now pointing to the Charlie Decker place. The place right south of the Charlie Decker place is the same building I had rented out to another party, and the barn here on the lots to the west side of that, there was feed lots between that and where the barn was. There is no building there now, not on the profile. In 1921, as to the depth that the water got in there, it was going through my barn about, pretty near just about up to my knees. [141]

#### Cross Examination

(By Mr. McCarthy).

I am a plaintiff in one of these suits against the railway company, that I claim damage as the result of this flood.

Q. By the way, Mr. White and Mr. Drake, who were on the stand, are also plaintiffs?

Mr. MAURY: Objected to. The best evidence is the record, if you want an admission why they are.

My oil station—the ground across the street there at my oil station, the floor of the warehouse of the oil station would be lower than the Pickering pool hall.

Q. The southerly side of Orgain Avenue at Main Street, is higher than when you get down to where your oil station is and on the right-of-way of the railway?



(Testimony of Dan Sutherland.)

A. The south side of the building and the office, I think, ought to be about the same level, I think, as the Pickering pool hall place. It slopes down; there is no floor in the warehouse, so that would be lower; the ground slopes down after you get across Orgain Street.

Q. Yes. Let's take it this way: Up here on Wibaux or Main Street, in the center of the street,—now, let us take a point opposite the rear of the Pickering pool hall. Now, compare this ground,—this point—with the ground over here where your oil station was, taking the street,—the street is going down grade?

A. There is quite a drop from the north side of the street to the viaduct. I could not exactly tell you what that grade or slope is in there. Your measurements will show you exactly what that is Mr. McCarthy. It is lower here than it is to the south of Orgain Avenue, and that would create an appearance there of the water being higher up on Wibaux Street than it would down towards the viaduct.

I got up on top of the Milton Hotel and I could see to the south of the town.

Q. And the whole valley was full of water? [142]

Mr. MAURY: We must object. The valley was 65 miles long.

The COURT: Put some limits.

Q. As far as you could see?

Mr. MAURY: Objected to as indefinite, because the jury couldn't tell how far he could see.



(Testimony of Dan Sutherland.)

Q. What is the fact Mr. Sutherland?

A. South of the town, I couldn't say how far,—but there was water there. I wouldn't want to say how far I could see to the south; I might see a mile or two miles. I think inside of two miles,—less than that; one to two miles would be all you could observe. It looked like a great wide river there; there was a lot of water there; and this water was flowing from the south towards the north, and towards Wibaux,—it always flows that way. This 1929 high water was beyond anything I had ever seen in the way of a flood there in Wibaux in 33 years.

In regard to this Rapelje meeting that I talked about,—I was not an official; I was not the mayor or acting mayor, nor an alderman at that time. I was down there just as one of the members of the Commercial Club.

Q. Mr. Rapelje got off the train and talked with you men there?

A. He did.

Q. You were just listening in? You didn't have any conversation yourself with Rapelje, did you Mr. Sutherland?

A. Not farther than meeting him there. When I met him, I said "How do you do, Mr. Rapelje," and that was about the extent of any talk I had myself.

Q. What conversation took place with Mr. Rapelje was with others than you?

(Testimony of Dan Sutherland.)

A. The conversation that I expressed to you here. He was talking to Mr. Cullen, the mayor, or anyone that asked him any questions. I don't remember that I asked him any questions. But I remember the first thing that was brought up was [143] "Would the railway company do something so that the school children could get over across the railway to school without the necessity of going over the railway track", and that request was complied with by the railway company; right after that, the underpass was put in, as he promised us. Then, there was a complaint about the bridge over Main Street or Wibaux Street,—there was some claim that it was muddy down underneath there. There was some talk about that at that time too, and some complaint about the center pier. Mr. Rapelje explained the difficulty of doing any work in that connection.

Q. Now, when you came to talk about the bridge over Beaver Creek, Mr. Sutherland, isn't it a fact that all Mr. Rapelje said was that they would some day, widen that bridge or raise it?

A. Lengthen it and raising it.

Q. Was the word "lengthen" used there by Mr. Rapelje?

A. The meaning of the word was——

Q. Take the questions one at a time, Mr. Sutherland. Did Mr. Rapelje say that the railway company would lengthen the bridge over Beaver Creek? Yes, or no?

(Testimony of Dan Sutherland.)

A. He was asked the question when he was going to give us a longer bridge,—that we needed a longer bridge over Beaver Creek—and he gave the answer that that would not be done until they raised the track.

I was a witness in the case of Heckaman vs. The Northern Pacific, tried in the State District Court here in Montana, in Fallon County.

Q. I will ask you to read the indicated part there on page 371 first, and another part later that I will call your attention to.

A. Yes, sir (witness reading).

Q. Now, I call your attention to the bottom of page 373 and top of 374.

(Witness reading)

A. That is correct.

Q. Mr. Sutherland, the meeting with Mr. Rapelje took place where? [144] Where was this talk had, near the depot?

A. Underneath the viaduct, after he looked at the piers. I think it was after he looked at the piers underneath the viaduct. Mr. Rapelje and the other gentlemen were standing on Wibaux or Main Street down underneath the viaduct; they examined those piers—the viaduct.

Q. Mr. Sutherland, having refreshed your recollection by having looked at your previous testimony, do you want to still say that Mr. Rapelje mentioned anything about lengthening the bridge?

A. He was asked about the lengthening, and I have answered it that way, but the meaning was that



(Testimony of Dan Sutherland.)

he was going to give us the longer bridge. I have answered it "wider bridge" to you.

Q. Didn't you testify in the Heckaman case at Baker, Montana, in the State District Court, in Fallon County, substantially, as follows: "And he told us," (he, referring to Rapelje), "'This viaduct for the children we will give you that immediately, but this bridge here, we won't do nothing at the present time as to the bridge over the creek, because we expect to raise this track, and that we expect in the near future, then we will give you a full-width bridge here, and we will raise the other bridge and give you a bridge there.''" Is that what he said?

A. Yes, sir.

Q. Now, was this question asked you and wasn't this answer given in the same Heckaman trial? "Question: Also, at that time, you say he said something about the bridge No. 184 over Beaver Creek? Answer: He didn't mention no length, but they were going to 'widen it when the track was raised'—the bridge over Beaver Creek. Question: Widen it for double-track? Answer: No; he didn't say, but we took it for granted he meant lengthwise." Was that testimony given? (No ans.).



NICK WAGNER,

being first duly sworn as a witness in his own behalf as plaintiff, testified: [145]

Direct Examination

(By Mr. Maury).

My name is Nick Wagner. I have lived in Wibaux 24 years, going on 25 the 5th day of March.

Q. Where was your place of business on June 7, 1929?

A. This "business" is something new to me; you know where it is. I am a native of Luxemburg; I speak Luxemburg.

Q. Listen very careful now. I know it is hard for you to understand me. I can't always understand you; I don't speak Luxemburg. Was your place of business on June 7, 1929, right here at Wibaux Street and First Avenue South?

A. Yes.

Q. Where did you sleep that night that the flood came, Nick?

A. I was in the store that night. I woke up the next morning somewheres about half past 6:00—somewheres around there. As to what I did when I woke up, we had some stuff underneath the table and I tried to get it to the top of the table and counters. I don't know what was outside of my place of business when I got up; I got busy in the store. As to what was in the basement when I got up,—I hear the window come, kind of noise. I went down to see, but I couldn't; there was too much

(Testimony of Nick Wagner.)

water there. Then I started working, fixing up the stuff in the store so to get it up from getting wet. I was trying to raise the stuff up higher from the floor, you know. Then the water came in—not to the top—but it came in the basement; I hear it and see it. Later, I tried to open up that front door that morning; about 7:30 somebody tried to get me out of there. That morning, my merchandise—clothes, trousers, shirts and everything—wet; it got pretty wet. The shelves tipped over after the water got high, you know. Every kind of stuff came in on them, you know,—mud, and I don't know,—pretty dirty stuff. When the flood went away, everything inside there looked bad, everything dirty, tables tipped over and shelves tipped over, and finally, I had to climb up on top of it. [146] I climbed up on top of it all because it was too wet down there; it got too high for me.

The COURT: Mr. Maury, you will have to repeat what he says.

Mr. MAURY: Yes; I will try.

I climbed up on top of it, because the water got too high for me—you bet.

Mr. MAURY: I will have to ask permission to ask leading questions, because it is one of the cases as far as the physical happenings are concerned.

The COURT: I am satisfied some of those jurors didn't hear a word of it, hardly. Repeat his answer.

I opened the front door that morning. I couldn't shut it again—"not so easy". It stayed open for

(Testimony of Nick Wagner.)

awhile; I couldn't shut it. All of the shelving fell down. As to what happened to the high clothing as well as that that was down,—all went down, every bit of it. The clothing in the shelves was about 10½ inches to 2 foot above the floor. There was none of my stuff on the floor; it was up on the shelves, and the lowest shelf was 10½ inches to 12 inches high above the floor.

After that flood, my clothing and my shirts and my other property smelled strong—smelled pretty strong, I tell you.

Q. How were they as to being soaked with silt?

A. I didn't have much luck with them. I tried to sell them,—you bet you. Such articles as I sold, the most of them "come back". They come back because they didn't want them.

Q. Nick, how much stock did you have in that store before that flood?

A. Before the flood——

Mr. HALL: We object to that on the ground that his inventories, or his record, is the best evidence of what he had, if he had any such record.

The COURT: I expect so. He ought to have some books. [147]

Mr. MAURY: We have the book. The original invoices we claim are lost through the entire fault of the defendant. There was a pile of mud and all records in Wibaux that got in that mud—even the First National Bank records—were hauled out to the dump.



(Testimony of Nick Wagner.)

The COURT: Never mind about that.

I haven't got any invoices,—everything mud; I couldn't see nothing. Soon after this flood, me and my daughter Olivia, tried to figure out what I had there. We had to send some stuff away to get dry-cleaned, you know. Some of it come back you know. We took it away, you know, but some of it come just back you know—not altogether. Olivia made this book that you are showing me. That is in her handwriting; she wrote every bit of it. After the flood she started making this; I don't think anything done before the 7th day of July, then she started making it, I think,—somewheres around there. I tried to put down here, or tell Olivia to put down all my merchandise and goods that I had there. As far as I know, I told her correctly at that time, as near as I could, and it was correct. I gave her the values of the clothing and everything,—the articles that I had and that I told her to put down; I give her the amount that I pay for the goods. It wasn't retail, but wholesale prices that I was putting down here; I didn't put any retail here. So far as I know, I spent \$2200.00 trying to get the clothes cleaned up. I couldn't sell them after they were cleaned up; it didn't do much good. The value of the goods at wholesale, that I had in there before that flood, that is supposed to be around \$30,000.00. It consisted of suits, overcoats, shirts, underwear, mackinaws,—all kinds of stuff you know,—all kinds underclothing and socks.



(Testimony of Nick Wagner.)

Q. And how about shelving Nick,—fixtures?

Mr. HALL: We object to anything about shelving; there is no allegation about shelving. [148]

Mr. MAURY: When was that deposition taken Mr. Colton? We ask leave to amend and state that the defendant has had notice of this since November 21, 1933, as to what the losses were, from a deposition that was taken at that time from Nick Wagner himself.

Mr. HALL: We object to amending their complaint at this time, nearly five years after the alleged damage. The complaint was filed January 29, 1931,—nearly two years after the damage and attempting to amend at this time, and they certainly knew what their goods were and what their damage was, two years afterwards if they know five years afterwards. We object to any amendment at this time as to the amount of damage on account of laches; and they are not entitled to it.

The COURT: Was that deposition taken with some counsel present, or a member of the staff of counsel?

Mr. MAURY: Mr. E. M. Hall was present November 21, 1933.

Mr. HALL: We appeared there. Counsel served notice. We appeared there and they gave that deposition.

The COURT: Was there any objection made at that time to the testimony along that line,—in reference to fixtures?

(Testimony of Nick Wagner.)

Mr. HALL: Yes; we objected there and had counsel make a statement there that they were making no claim for fixtures.

The COURT: That they were making no claim for fixtures?

Mr. MAURY: We, at this time, ask to amend as to the value of the merchandise to \$28,000.00 instead of \$18,000.00.

(Jury excused. Argued by counsel)

Mr. HALL: They come in here and file a complaint in a year and three-quarters in which they allege the value [149] of the stock was \$18,000.00 and they claim \$15,000.00. Then they go on more than four years afterwards and claim damage of \$26,000.00 and made no attempt to amend; the rule of laches comes in here—all that time.

The COURT: Just a minute. When was this complaint filed?

Mr. HALL: January 29, 1931.

The COURT: When was the deposition taken?

Mr. HALL: November 21, 1933.

The COURT: Not so very much time has elapsed as to the taking of that deposition. You were present and were aware what they claimed and showing the same inventory practically, was presented at the time the deposition was taken.

Mr. MAURY: This cause is sui generis.

Mr. HALL: We say that he cannot recover more at this time and should not be permitted to amend his complaint when he come in a year and a half

(Testimony of Nick Wagner.)

after the flood and swore his total merchandise was \$18,000.00. He knew it then as well as he does now; he had that in his possession at that time. Now, he goes on down to last November and comes in and introduces a record that he sold some \$13,000.00 worth of stock; and now, to keep his damage up, he claims he had \$26,000.00 damage at that time. He knew it in 1931, because that inventory was taken in 1929,—July 7th. Now, he didn't ask leave to amend at that time. \* \* \* \*

The COURT: He swore to it after you had taken an inventory and appraisalment, which you propose to introduce?

Mr. MAURY: Yes, sir.

The COURT: Now, you ask to amend. I don't believe I will allow that amendment.

Mr. MAURY: Exception. [150]

The COURT: Well, I think I will deny the application to amend in both instances. Very well. Call in the jury.

This list is a correct list of my stuff,—merchandise, and a correct statement of the values, and nothing else,—absolutely; absolutely correct, and all the values, you bet.

Mr. MAURY: We offer it in evidence.

Mr. HALL: Oh, I will not object to that going in evidence there. That is, object to it as not to show that they are entitled to any more damages than they are asking for in their complaint; and we object to it if it is offered for any purpose of



(Testimony of Nick Wagner.)

amending their claim for damages. And upon the further ground that the complaint in this case shows that the plaintiff swore to and signed the complaint, which he alleged at that time that his stock of merchandise was \$18,000.00, which complaint was sworn to on January 29, 1931, and he now comes in and seeks to offer an inventory in which he claims that the stock of goods is \$26,000.00.

Mr. MAURY: That is all for argument to the jury. I couldn't understand Nick on his figures then any better than I can now,—when I drew the complaint.

(Mr. Maury reading): “July 7, 1929, Inventory; lot number; size, price, total;” Just going fast over these to show the kind of stuff he had gentlemen. (reading from page 1) They total on that page \$1851.50; another page (page 2) \$1867.00; (page 3), suits and clothes listed, totaling \$1356.00 on that page; turning to page 4, suits listed \$1374.00; men's suits on page 5, \$1278.00; on page 6, \$1159.00; boys' suits, entire page 7, \$711.00; page 8, \$319.00; page 9, boys' overcoats \$506.50; page 10, men's overcoats \$1273.50; page 11, \$273.00 and \$741.50; on page 12, \$294.00; page 13, \$400.00; page 14, \$153.00, \$198.00; page 15, [151] \$435.20; page 16, \$166.84; page 17, \$21.60, \$274.94; page 18, \$222.00, total of \$300.00, bottom of page 18; page 19, total \$134.25; page 20, \$73.95; page 21, \$678.25; page 22——

(Q. What is Spaide? A. That is the name of some shirts.)

We find shirts, and Spaide shirts, \$656.80.



(Testimony of Nick Wagner.)

(Q. I find the word "Suede" here. What is that? Stuff they wear now? A. Sure; they look like leather, but they are not,—kind of moleskin.)

Page 23, \$832.00; page 24, \$574.50; men's work shirts, \$398.79; page 26, \$125.81, \$63.00; page 27, \$60.00, \$697.65, \$217.30; page 28, caps, \$140.20; "PJ", 2-piece, men's pajamas, \$177.50, \$311.85; page 29, \$522.28; page 30, \$116.00, \$111.30, \$103.30;

(Q. What are "Black Fireman Engineer?" A. That is name of them—kind of work socks; "Corodovan", that is good socks).  
\$385.59.

(Q. What is Munsing wear? A. Underwear. Stephenson make just as good; Munsing wear is good; you can't beat it—silk and cotton and wool too; Stephenson, that is good—just as good as the Munsing—we think so.)

\$1602.25; page 33, \$1797.94; page 34, \$277.00, \$61.50, \$36.37; page 35, \$424.50, \$31.25, \$17.40; page 36, shoe laces \$71.82. The total of the merchandise \$25,976.43. I have not read the fixtures.

Q. Nick, what was all of your stuff worth after that flood? How much could you sell it for?

A. I sold it sometimes for something, but it would come back—most of it come back.

Q. How much would you say it was worth, Nick? What would anybody have bought—any other merchant walking in there looking for it—what could you have gotten for it? I say, what would anybody have given you for it?

(Testimony of Nick Wagner.)

A. They would give me more than I had coming, but you couldn't——

Mr. MAURY: Is your daughter here?

A. Yes; you bet you. [152]

Q. (Speaking to Miss Olivia Wagner): I want to find out what any wholesale man, or drummer, coming into that place the day after that flood would have given him in money, for that stuff?

Mr. HALL: We object to that as calling for a conclusion,—this witness trying to testify what some drummer might have come in there and offered, we think is too vague and uncertain. If he had some offer or something definite, but simply to say what some drummer might have come in and offered. He asked what some drummer might have paid for it.

Q. Now, Miss Olivia, you ask him what his stuff was worth in the market the day after that flood?

OLIVIA WAGNER: What would you have sold it for?

A. I would have asked him too much.

Q. The day after the flood, could you have gotten for all that muddy stuff \$1000.00?

A. Well, we had good stuff, yes, you bet you.

The COURT: What does he say it is worth? If he doesn't know, let him say so.

Q. What could you have sold it for?

A. \$1000.00.

Q. Could you have gotten \$1000.00?

A. I don't know.

(Testimony of Nick Wagner.)

Mr. HALL: I move to strike the answer out; he hasn't shown that anybody offered him that.

The COURT: As near as I can make out, he could have sold it for \$1000.00; presumably, he considered he could have sold it for \$1000.00. We will let the answer stand for what it is worth.

Q. How much was it worth the day before the flood?

A. I would have to have \$30,000.00 for it. Nothing has been paid me by anybody for this loss.

Cross Examination:

(By Mr. Hall).

Q. You never filed any claim against the railway company for [153] damages before the time that you filed your complaint did you?

A. Yes. That is the first time. The first time the railway company knew I was going to sue them was when I employed counsel and filed my complaint.

Q. You signed that complaint? That is your signature?

A. Who got that?

Q. You wrote that (showing papers to witness)?

Mr. MAURY: That is a copy.

Mr. COLTON: I signed as Notary Public; that is my signature there on the copy.

Mr. HALL: You took his acknowledgment to the original?

Mr. COLTON: Yes, I did.

Mr. HALL: Did he sign and swear to it, according to your certificate?



(Testimony of Nick Wagner.)

Mr. MAURY: We object to that as not the best evidence.

Mr. HALL: Mr. Colton has made his verification there as Notary Public.

Mr. MAURY: If you want us to admit that that is an exact copy of the original complaint, we do so freely. But as to testing Nick as to his signature, that is not his signature.

Mr. COLTON: We will admit it is a correct copy.

The COURT: You can interrogate this witness along that line, and Mr. Colton too, if you want to.

When I brought the suit, I went in and signed a complaint, and swore to it before Mr. Colton. In that complaint I did not say that my stock of merchandise was worth \$18,000.00. I didn't say that.

Q. Didn't you make a report to Bradstreet & Dun in September, 1928, that you had a stock of merchandise at that time of \$15,000.00, when Mr. Larson—you know what Bradstreet & Dun is?

A. Yes. [154]

Q. But you made reports?

A. No, no.

Mr. MAURY: We object to that as too remote—what he did the year before. And it isn't shown whether he was stocking up, or was stocking up for spring, six months before.

The COURT: What do you propose to do?

Mr. HALL: I think he made a report that year and another one the next year, and then followed that up with the same amount of stock.

(Adjourned until 9:30 A. M., March 28, 1934.)



(Testimony of Nick Wagner.)

(By Mr. Hall, continuing):

Q. Mr. Wagner, you made reports to Bradstreet & Dun?

A. In the last 15 years.

Q. Didn't a representative of Bradstreet & Dun call on you about September 29th, 1928, and at that time you made him a report——

A. I did not.

Mr. MAURY: I move to segregate; there are two questions.

The COURT: Yes.

A representative of Bradstreet & Dun may call in September, 1928, I don't know. I did not make a report; didn't make any report at that time. I couldn't tell you whether he called on me October 5, 1929, I don't know. I did not make any report then.

I carried about the same stock of goods from year to year, for several years. I had something like the same stock in 1928 that I had in 1929, at the time of the flood.

Q. And you made out an assessment list for the year 1929, for the stock you had on the first Monday of March, 1929?

A. I left it to Mr. Howard, the assessor. I swore to it before Mr. Howard; I made the affidavit before Mr. Howard; that was Mr. W. C. Howard; he was the county assessor.

Q. And in that assessment list, Mr. Wagner, did you not make a return of your merchandise at \$1300.00? [155]

(Testimony of Nick Wagner.)

Mr. MAURY: The assessment list is the best evidence.

The COURT: Very well; present it.

(Marked Defendant's exhibit D-4)

Q. And in that assessment list, the fixtures was assessed at \$250.00?

A. I never looked at it.

Mr. HALL: We offer this (D-4) in evidence.

Mr. MAURY: No objection.

The COURT: It may be received. (Exhibit read to jury.)

I was supposed to be the owner of that stock of goods. I was the owner; they were my goods. While that was made out in the name of Olivia Wagner,—well, I don't know whether they were my goods; I signed it over.

Q. Well, you testified they were your goods?

A. Well, I don't know.

On July 7, 1929,—that was about a month after the flood—I took a list of my goods in the store there. My daughter wrote it down in this book (plaintiff's P-3),—I didn't take that all on July 7th—the stuff came back. But I started on July 7th. On July 7th I got all the dirt pretty well cleaned out then. I sent some of my suits to Miles City to be cleaned, and some cleaned down home; and some of them sent out in the country to be cleaned. In taking this inventory, I had to go around and handle and examine each suit of clothes,—and each hat—and made a list of it. My daughter went around

(Testimony of Nick Wagner.)

with me and she handled the clothes too, and when I would find some piece of clothes, she would put it down in the book; she would carry this book and write it down. I don't know,—maybe three weeks, maybe a month, making this inventory—maybe every day and some nights. I used this book right along taking that inventory—maybe not this book here—but we had scratch book to put it down at the same time and then we put it in here. The flood didn't open the doors; the door wasn't open in my store; I kept the doors closed.

Q. The water simply seeped under the cracks and kept raising until [156] it got five feet high?

A. It didn't get five feet high,—51 inches.

Q. But it didn't wash in the door at the front or the door at the rear?

A. I opened that door myself.

Q. You opened that while the flood was coming in or afterwards?

A. No; before. During the time the water was coming in the building, the door was closed. I had some clothes on racks there,—cabinets, with rods there, where I had my suits hanging on. I didn't have any shelves above the racks.

Q. Just about how high were those racks (indicating)?

A. Higher than that.

Q. 7 feet. You could reach up and get a coat off the hook though?

A. Oh, yes, I mean the hat-box. I had my hat-boxes stacked up above the racks. I didn't have



(Testimony of Nick Wagner.)

any clothes on shelves. My building was 25 by 73 feet long. Using the rear end of the courtroom here as the front end of my building, facing on Wibaux Street, there was a stairway that took off about two and a half feet.

The COURT: Your record won't show that.

Mr. McCARTHY: The north side Mr. Hall, is that what you mean?

Q. Yes; the building was facing Wibaux Street on the west?

A. Yes. And on the north side of the building there was a stairway that took off,—two and a half feet of the stairway for a distance back somewhere about 20 feet, and on the southwest corner of the building there was another door came in at the rear, and I had a recess there—that door set back in 10 or 12 feet, that took off 10 or 12 feet of the wall-space there, something like that. Then, I had across the rear of the building, at the east end, a little room partitioned off there, that was five or five and a half feet wide, maybe.

Q. Now, you had your racks beginning where that stairway stopped on the north wall, back to this little partition at the rear? \* The racks where you had your clothes?

A. The casings—they was [157] against the wall from the point where the stairway stopped down to this partition. We had racks hanging up, just hooks in the wall. On the south side, I had casings along that wall, the casings they were wooden cab-



(Testimony of Nick Wagner.)

inets. The depth that they stood out from the wall was something like that—about where your foot is,—two and a half feet. They were wide enough for a coat to hang on a rod in the middle—and the shoulders,—two and a half feet. I had the cabinets made; they had a base; they sat on the floor, and the clothes I had in there hung on this rod in the center of the cabinet. I had my mackinaws and leather jackets on this part here,—on this partition (pointing to the north wall); I had rods all over besides the casing. I had to hang them up this way—just the same as the casing. As to where I kept my socks, neck-ties and things of that kind, I had showcases; these show-cases were in front. I had tables—common tables—ordinary tables standing up like that; the height of the tables was about like that (indicating reporter's table). In the basement was Mr. White's printing plant. I didn't have any stuff in there. All this stock was in one room. The water tipped over all these cabinets, casings; and tipped over the tables—they went first. I don't know whether all the clothes were completely covered with water; the cabinets was pretty well loaded with suits. They tipped over.

Q. When they tipped over, were they all covered with water?

A. Oh, no, some part of them was hanging in there.

Q. I understood you to say all those cabinets tipped over on the floor?

(Testimony of Nick Wagner.)

A. You know they can't get down on the floor; there was quite a few in there.

Q. One fell over on this side and another fell over on this side, on top of each other?

A. They was there. All the clothes got wet. I wouldn't say that they all got wet from that flood. I would say something like 75% of them maybe were completely soaked. [158]

I took an inventory the first of each year. That was destroyed in the flood. I had a safe and a desk too. I don't know now whether I kept my inventories in the safe. The water got in the safe. The water so obliterated the figures on my inventories so I couldn't read it. I testified this was the wholesale price of the suits. As to how I got that information after the flood,—just as soon as I get the goods in I put the wholesale price on the coat ticket and pants ticket; that was a paper ticket.

Q. After the flood and after you got these clothes back, you could still read these figures?

A. On some of them. I said 75% of them was all wet; I could read that on most of them.

Q. So the water didn't affect that like it did on your inventory?

A. Well, that was more protected there.

On the 21st of November, 1933, my deposition was taken down at Wibaux; I appeared before Mrs. Young and gave my deposition to Mr. Colton and you.

(Testimony of Nick Wagner.)

Q. And after introducing this order book, plaintiff's exhibit P-3, you also at that time, had a type-written list, did you not, which was a copy of all the things that were shown in the inventory, in exhibit P-3?

A. You got to show me now. Here was the inventory written out in my daughter's handwriting. Then Mr.Colton made a typewritten list, in which I testified that that contained all the things that was in this inventory, I guess,—he didn't put each suit there but—I testified, I guess, that that was a correct list of what was in this book here; that is what I testified down there.

Q. Then after that typewritten list was made out showing the coats, suits and everything that was in your inventory, you introduced this. In whose handwriting is that? Was that made out by your daughter too, in pen and ink?

A. I will have—I can't.—

Q. Do you recall you made out a list of what was listed, after the flood, and that was put in this typewritten list?

A. I don't [159] know so much about this, but this one—It is a fact that I had that list put down as to what I sold that for, and what it was worth after it was cleaned and after it got back there; that is the value, and I took this list and put down the values I said the stuff had after it was damaged. That is represented by these figures in pen and ink on that document you have in your hand.



(Testimony of Nick Wagner.)

Q. I have now had this paper I have just been questioning you about marked as defendant's exhibit D-5, and these figures in pen and ink is what you say was the value of the stuff and what you got for it after the damage?

A. What I got for it, I couldn't tell you that; some of it is there yet. Lots of it,—most all, of that stuff had been sold at the time I gave my deposition.

Q. Calling your attention to the deposition I have here, on page 11, it says Mr. Hall asked this question: "At the time you made this list (referring to exhibit D-5) in November, 1933, most of that stuff had been sold" and you answered that "Yes"?

A. Yes.

Q. And over on page 17: "And from the time you made out the first list, which you claim was made in July, 1929, and after the goods were sent to the cleaners and came back, you sold them to whoever would buy them," and you answered that "Yes"?

A. Yes.

Q. "And you didn't keep any record of those sales?" You answered that "No."

A. Yes.

Q. "And you put the money in the till and closed that transaction?"

A. Yes.

Q. "The estimate you made on the goods you got on that list is what you made out a week ago?"



(Testimony of Nick Wagner.)

That is this estimate here—D-5,—and you answered that “Yes”, did you?

A. Yes.

So, I had no record at the time I made out this list in pen and ink on this typewritten sheet (exhibit D-5), as to just what I did sell each article for,—I couldn’t do it.

Q. You put that down from memory?

A. Well, I sent it, and the [160] next day we got it back. I don’t know how much these items are——

Mr. HALL: I have added them up,—\$13,540.87. That is the value of the stuff after it was damaged.

Before I went to Mr. Colton to have him prepare a complaint for this lawsuit, I talked it over with him and told him how much I had been damaged, so I could sign the complaint.

Q. And you told him how much goods you had so he would be able to prepare a complaint?

A. Yes.

Mr. MAURY: Mr. Hall, I am responsible. Don’t put it on to Mr. Colton; it really is my fault.

I talked to both of them; I think it was Mr. Maury mostly.

Q. So, if they made a mistake, they both made a mistake? Now, in your complaint,—calling your attention to the certified copy of the complaint on file there, (and I will say to the Court, we have made arrangements to get the original here), you allege you owned a stock of men’s goods, haberdashery \* \* of the value of more than \$18,000.00,

(Testimony of Nick Wagner.)

and that the flood caught, soaked, carried away \* \* value of the stock to the amount of \$15,000.00." Did you give your attorney that information?

A. No; I don't know nothing about it.

Q. Well, if your stock of goods was \$18,000.00 at that time, and you were damaged \$15,000.00, you figured you had saved out of the wreck about \$15,000.00?

A. That stock was \$28,000.00 when it came back, the stuff cost that much. I doubt if the town of Wibaux had 612 inhabitants; it used to be bigger than that. The complaint alleges we had 612 population there,—I never looked; I didn't know it even had a street-name there.

I said that my daughter and I made out this inventory (P-3), in which we put down the wholesale cost of all my articles.

Q. That added up for the merchandise and stock of that kind, according to my figures, \$26,026.11.

A. That is the stock, without the furniture. And I say that those figures were based [161] upon the wholesale prices that I found on the back of the clothes.

Q. Then where did you get your basis to testify now that that stock was worth \$30,000.00?

A. You can ask me another question.

Q. You testified that this inventory showed that that stock was worth \$26,026.11. I understood you testified yesterday that your stock was worth \$30,000.00. Where did you get that basis?

(Testimony of Nick Wagner.)

A. Ask me another question and I tell you.

Q. How did you figure?

A. You know when you give out stuff, you keep track of it and when it came back, I was over \$2,000.00 short. That means with the fixtures and the stock; we always had the fixtures in. The stock without the fixtures—just the merchandise—comes to \$26,000.00. I testified the merchandise was worth \$30,000.00 with the fixtures.

Q. Oh, that is what you are trying to do?

A. Yes.

Mr. HALL: Now, this exhibit D-5, calling to the attention of the jury,—the witness has testified these items here are a copy of the inventory taken after the flood—— (witness ill) \* \* \* \*

The COURT: What balance is shown due there from that list you were reading to the jury?

Mr. HALL: Well, it showed a balance according to this list here,—if his valuation, as he alleges in his complaint, was \$18,000.00, and if he got \$13,540.00,—what he claims in this last list, it would be the difference between that and \$18,000.00 But yesterday, they sought to amend the complaint and raise the value of the stuff to \$26,000.00 \* \*

Mr. MAURY: Then add \$2200.00 for the cleaning up. \* \* \* We will replace Wagner when he gets all right your Honor.

Mr. HALL: We now offer defendant's D-5 in evidence.

The COURT: It may be received in evidence.



MRS. PATRICK COYNE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Maury).

My name is Mrs. Patrick Coyne. I lived in Wibaux on June 7, 1929. I went into the place of business of Nick Wagner after the flood; got there about 1:00 o'clock. I walked through the streets in getting there.

The COURT: Is this the day of the flood Mr. Maury?

Mr. MAURY: The day of the flood—right after.

Describing the condition of the merchandise as I found it in that store of Nick Wagner's right after that flood, when I walked in the store, the show-cases, the tables, the caps, hats, everything were piled, and it was covered with mud, filth; we could hardly walk through the store. We had to walk over the clothes, and it was too heavy,—it was soaked with mud,—it was too heavy for the women that were along with us to lift anything. So we went out and got a few men to help us, and then we saw the condition of the clothes. The clothes was in very bad condition; it was dirty and full of mud, filth of all kinds. In fact, we were very much discouraged.\* We tried to pick some of it up, but it was "glued" to the floor in the mud; the mud was so thick that we almost gave up right away.

Q. How long did you work there for Nick (Wagner) in trying to assort things and pick them up and put them together?



(Testimony of Mrs. Patrick Coyne.)

A. On Friday, after the flood; Saturday, all day; Sunday, Monday, Tuesday, Wednesday and Thursday.

Q. You may describe to the jury the odor of that merchandise?

Mr. HALL: We object to that on the ground that they cannot recover for the odor.

Mr. MAURY: It went to the sale or the value of the merchandise. [163]

The COURT: Yes, somewhat. Overrule the objection.

A. The odor was terrible. When I went home, I had to use lysol to wash myself with,—filth of all kinds; in fact, some of us were sick at times.

I worked there Friday afternoon, after the flood; Saturday, all day; Sunday, Monday, Tuesday, Wednesday and Thursday,—all day. As to whether the merchandise had gotten out of the showcases, or how it corresponded with the positions in which it was in the store before, will say some of the glasses broke in the showcases where the suits were and the overcoats,—some of them, and of course, they washed through, and some of them were just as they were before the flood, but wet, that you couldn't lift them up,—wet, soaked through. I was in that store on Tuesday before the flood; I would frequent that store at least about three times a week. I live just a mile out of Wibaux, across the river from Mr. Massey's, on the west side of the river—about opposite to Mr. Massey's place. I

(Testimony of Mrs. Patrick Coyne.)

didn't see anything in the nature of drygoods, underwear, mackinaws, rubber goods, socks, or anything like that, that escaped that soaking with mud. When I went in, right at the front door, there was a showcase right near the door, and then there was a lot of shirts and underwear and caps and gloves piled right near the door, and we couldn't go around because there was other showcases that had flooded around in the place, so we just had to crawl over them. The piles of mud and stuff in there were, I should judge, about the height of that lamp there (on judge's bench),—because those showcases were quite high. Nick Wagner sold good stuff, very good, goods and merchandise.

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NICK WAGNER,

recalled for re-direct examination, by Mr. Maury, testified:

I answered Mr. Hall that I had not given Dun & Bradstreet [164] a report for 15 years, something like that. I didn't need them. That was because I could get all the credit that I wanted—more than that. The Dun & Bradstreet man came in there about October or the year before the flood, I can't tell you the time. When he came in, I told him "I don't need him." When Bill Howard, the assessor, came in, I told him,—he says, "Nick, I want to assess you." I told him, "All right". I went and

(Testimony of Nick Wagner.)

got the book, I showed him that, and I told him, "Here it is, Bill; make the best you can", and he went out. I didn't read what he made. I signed it,—signed the assessment.

Mr. Colton and I worked on this thing, I don't know how long, before my deposition; I know we worked on it, but I can't tell you whether it was a week or not; can't tell you how long.

Mr. McCARTHY: "This thing" doesn't mean anything.

Mr. MAURY: This defendant's Exhibit D-5 here \* \* \*

I tried to get the valuations the best I could here; they are substantially correct, absolutely.

Q. How much money did you pay out for getting your stock cleaned?

Mr. HALL: Objected to as immaterial under the issues. The complaint merely alleges \$15,000.00—or \$18,000.00 stock of goods, and alleges \$15,000.00. We object to it on the ground that they have not laid any special damages in the way of cleaning up the stock, and under the generality that the goods were damaged to the extent of \$15,000.00 would not include special items such as cleaning damages.

The COURT: I am not quite so certain whether that would be part of the damage to the goods anyhow, the damage sustained. However, I think you should have alleged a special damage there. \* \* \* It isn't shown by that list?

Mr. MAURY: It isn't shown by the list.



(Testimony of Nick Wagner.)

The COURT: And it isn't shown in the complaint? [165]

Mr. MAURY: No.

The COURT: I will sustain the objection. If it isn't pleaded, I don't know how you can show it.

Mr. MAURY: I want to put in an offer of proof at this time.

PLAINTIFF'S ORDER NO. 1. (In writing)

"Plaintiff offers to show that the values in last column of Exhibit D-5 are after he had spent \$2200.00 in having his merchandise cleaned."

(Signed)

"Colton—Maury."

Mr. HALL: We make the same objection as previously.

The COURT: (reading offer) I will sustain the objection.

Mr. MAURY: We except your Honor.

The COURT: Let it go into the record.

I cannot tell you who made those figures that are in handwriting here,—Mr. Colton or Olivia, my daughter. I couldn't tell you whether they were made in Mr. Colton's office; I was sick, you know; I am not healthy. I told them to put the values down. I told them what I thought they were worth after; and what they were worth before, that is what the goods were before.

Q. And this was what they were worth after?

A. I didn't know what they were worth, but we thought that is what they were worth.



(Testimony of Nick Wagner.)

Q. And was that the worth of these goods here after they were cleaned up, or before?

A. No; we didn't know it; they was not worth that at that time.

Q. Did you give these values to Mr. Colton, of the value after they were cleaned up, or before?

A. After. You couldn't do nothing before.

Q. And was this what you thought the values were after they came back from various cleaners?

A. Yes.

Mr. HALL: We object to that as leading. Counsel is trying to lead him to say that is what he thought they [166] were worth before they were sold. The witness testified on cross-examination that practically all those goods had been sold at the time they made that list in 1933. Your question is: "Is this a list of what you thought the stuff might be worth".

They were sold after they were cleaned up—you bet you. None of them were sold before they were cleaned up; nobody would want them. The cost to clean them, everything—soap and stuff like that, amounted to around \$2200.00.

#### Recross Examination

(By Mr. Hall).

When Mr. Howard made the assessment in 1929, he came into my office in the store and I told him to look at the books; I had the invoices, and he looked those over,—I don't know; I went out.

Q. He looked over the books you had the first of the year and you told him to assess it?

(Testimony of Nick Wagner.)

A. Yes; around about the first of March. As a matter of fact, it was the second of May he came around (that is what the affidavit shows on the assessment list—2d of May); and from those books he made the assessment.

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OLIVIA WAGNER,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Maury).

I am the Olivia Wagner spoken of in the testimony. An assessment list with my name on it has appeared in the evidence. I didn't own any of those goods. Nick Wagner, my father, owned it. I helped him prepare lists of his merchandise. I did it as carefully as I could and put down absolutely what he told me. I commenced helping him on that about a month after the flood,—we started. This list here (Plaintiff's P-3), those figures are all [167] in my handwriting, taken from what he told me—absolutely. I had some knowledge of the business myself. I usually help him in that line; I am not in the store, but I helped him of nights, frequently.

Cross Examination:

(By Mr. Hall).

These figures on defendant's Exhibit D-5 are my figures too.

JOE D. CULLEN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Joe D. Cullen. I have lived in Wibaux since July 15, 1911. I was mayor of the town on a visit of Mr. Rapelje and some other Northern Pacific Railway officials there once. That visit took place in 1922. At that time I knew none of the railroad officials that got off the train but Mr. Rapelje; there were others there that got off with him, that seemed to be in his crowd. How I happened to meet him at the train, the station agent, whose name I can't recall at the present time, 'phoned me that Mr. Rapelje, and I think he said others, were coming through on a train and desired to meet the citizens of Wibaux. I then notified Mr. White, who was secretary of the Commercial Club, and I think Mr. Fisher, the president of the First National Bank, and I can't recall the other places. But I told each one I called to spread the news that Rapelje would be along,—that he wanted to see some of us. I don't recall whether I notified Dan Sutherland or not, but Dan was running a livery barn at that time, and drayman, and he wasn't always at home; he was up on the street hunting business. As to what took place at that meeting (well, if it could be called a meeting), a number of us went up to the depot [168] and Mr. Rapelje was at the head of the procession coming out of the car and knowing him personally,



(Testimony of Joe D. Cullen.)

having met him, I introduced him to others. I can't recall the names; they were strangers to me and my crowd—the people from Wibaux; they shook hands around there and Mr. Rapelje was acquainted with a number of them; and we went down on the street. Speaking from memory, I would say that Mr. Rapelje and his crowd were there that morning in the town, three-quarters of an hour.

Q. You may tell the substance, or give the exact words. If you can't give the exact words, give the substance of the conversation. Give it to the jury.

A. My objection in going there was to ask for a change in,—I call it the “viaduct”; some call it the “bridge”. Previous to my administration, the railroad was supported there with wooden piles. This (indicating) is the point I am speaking of on the profile—that is a new one on me. I can recognize this as Wibaux Street, and Orgain Avenue. That is the point I am now speaking of. We came from that longer building—the depot—and we came down on Wibaux Street in front of that viaduct, and that was supported by wooden piling, and it was low. It was difficult for a team or loads of hay, or anything of that kind to go under it, and we couldn't fill up that street to drain it properly on account of having to keep the street low enough so that wagons, threshing machines, things of that kind, could go under it; and we had asked for a concrete viaduct. That had been promised, as I understood it from my predecessor, Mr. Fisher. The



(Testimony of Joe D. Cullen.)

conversation was there: I told him that is what we were asking for,—that concrete viaduct—and he said,—it may not be the exact words, but the substance was, “We expect to put that in there,” that was “on the plans”, or something to that effect, “but when we put it in here, we expect to raise that track. If we put it in in the present condition, you would always have a low viaduct there. We are going to raise [169] that track four feet, but when we do that, you will see what will happen. We got to raise the track this way and that way,”—that would be east and west along there, “or else it would make a ‘bump’; you will have to grade way up there, and we will have to put in a new bridge or raise it.”

Q. Who said: “We will have to put in a new bridge”?

A. Rapelje was the man I was talking to; the other fellows might have been around. Rapelje was the man I was talking to. He mentioned that as the additional cost, that it was going to “cost too much”; that they “couldn’t afford to do it at the present time,” and he gave a promise,—possibly a little indefinite as to time—but, “We are going to do this.” When he said the “bridge”, I thought he meant the bridge; I call that on Wibaux Street, the “viaduct”, and a bridge——

Q. And the “bridge” was that——

A. That one there over Beaver Creek.

Mr. MAURY: This is only for the purpose of identification in case it might be needed on cross-

(Testimony of Joe D. Cullen.)

examination of other witnesses, so Mr. Cullen can go back home.

Q. Have you kept records of rainfall in Wibaux?

A. I have, yes. I kept it officially for two or three years; that was in Coolidge's time; that official record was discontinued, but for my own information and the information of my neighbors, I have kept a record of the rainfall in the gauge, the Government gauge there, and that was not kept in the book; it was simply pasted up in the cream station, previous to the flood; that was all taken away. I haven't those new ones here in this building; I have them in my room at the hotel in town here, from 1930 to last fall. I keep the records only for the growing season. They have been kept with substantial correctness. I will leave them with the reporter before I leave town. [170]

Cross Examination:

(By Mr. McCarthy).

I was the mayor of Wibaux in 1922. I had known Mr. Rapelje for some time; I knew him at Glendive. In 1922 my business was—I had been selling lumber ever since I have been there,—ever since I have been in Wibaux, and I am still selling lumber. The Northern Pacific agent told me that Mr. Rapelje and other officials were coming through and they would like to have a meeting with the officials of Wibaux. I went down to the depot and when the train came in, Mr. Rapelje and his party got off. I don't now recall who the other officials

(Testimony of Joe D. Cullen.)

of the railway company were that were with him. You understand, in explanation, they were strangers; I have been told since, but of my own recollection, I don't know. Among those that I notified were Mr. White, the editor of the paper.

When the railway party got in, and got off the train, the whole crowd—both the Wibaux officials and the railway officials—went down to Main Street or Wibaux Street, and most of us stood down near this viaduct or bridge over Wibaux or Main Street.

Q. Mr. Rapelje did?

A. Mr. Rapelje was with Mr. Ed. Fisher, who had been the mayor; not the banker;—he is gone now, and Mr. Bushell, who had been mayor before him.

Q. Mr. Bushell was there?

A. Mr. Bushell, Mr. Fisher and myself. Mr. Fisher is a lawyer, out in Washington now. He is former mayor and he no longer lives in Wibaux. He is a lawyer.

Q. The purpose in the railway officials meeting you was in answer to a complaint, or in response to a request from you people,—I mean the people of Wibaux—to do something to remedy the condition of the bridge or viaduct over Wibaux or Main Street?

A. That was the principal thing; yes, sir. One of the other things was a request that the railway company put in an underpass up near the school-house. That underpass was put in shortly after that—that [171] same year, as I recall it.



(Testimony of Joe D. Cullen.)

Q. Mr. Rapelje told you at that meeting to which you referred, that the railway company would put in a school underpass right away?

A. He told another fellow to go up with these men to see what was wanted. I think it was Mr. Fisher and Mr. Dahl that had children in the west end of town,—they wanted that up there. Some of them that were vitally interested in that pass went up with the other men, and Rapelje stayed down there with Bushell and other men I can't recall. I complained to Mr. Rapelje about these piers under this viaduct or bridge over Wibaux Street, and about the difficulty that hay racks couldn't get through, and binders couldn't go through, and Mr. Rapelje said it was planned at some time to raise that up, that is, raise up the bridge or viaduct over Wibaux Street and he explained to us that if the viaduct at Wibaux Street was raised, that would make a "bump", and consequently, it would be necessary to raise the track to the east and to the west. I understood that meant a raise in the track,—not just a few feet each side of the viaduct, but for a considerable distance east and west. I knew they couldn't raise the viaduct at Wibaux Street to give us the necessary clearance, or the clearance we wished for hayracks and other vehicles, without raising the track for a considerable distance to the west and for a considerable distance to the east. I understood that to the east it probably meant a raise in track as far as the stockyards; as a matter of fact, it was raised just this side of the stockyards.



(Testimony of Joe D. Cullen.)

Of course, if they raised the track easterly from the Wibaux Street viaduct or bridge as far as the stock-yards, they would necessarily have to raise the bridge over Beaver Creek, and that is what I understood Mr. Rapelje to mean. There was no complaint from me to Mr. Rapelje about the bridge over Beaver Creek at that time, and there was no complaint in my hearing, from others, although I wouldn't say there wasn't there. I heard [172] no talk to others by Mr. Rapelje nor heard him say anything about the adequacy or inadequacy of the Beaver Creek bridge; I heard nothing of the kind. The only talk was incidental to the raising of the track that would have to follow if the viaduct over Wibaux Street was raised.

I am the same Mr. Cullen who has been referred to in the testimony here, the manager of the lumber company located at Orgain and Wibaux Streets.

Q. It was said that on the morning of June 7th, on the day of the flood at Wibaux, Mr. Cullen was crossing the street in the vicinity of the lumber company, or was attempting to, and using a neck-yoke as a prop, are you the same Mr. Cullen?

A. Yes, sir.

Q. Where were you going from when you were attempting to cross the street?

Mr. MAURY: Objected to as improper cross-examination.

The COURT: Sustain the objection.

Redirect Examination by Mr. Maury:

Q. Mr. Cullen, are you the same Mr. Cullen that is mentioned as "J. D. Cullen, Mayor" (pointing to

(Testimony of Joe D. Cullen.)

minute book), and where the clerk was instructed to write to the superintendent of the railway——

Mr. McCARTHY: We object to him reading those minutes.

That is my signature. K. M. Orgain, mentioned here as clerk, is sitting back here in the audience; and that is his signature.

The COURT: What is that book?

Mr. MAURY: This book is the minutes of the town council of Wibaux, page 154.

The COURT: And what date?

Mr. McCARTHY: That is the same resolution you read to the jury the other day.

Mr. MAURY: Date, March 7, 1923.

I said there was a statement made that the railroad would put in a new viaduct here at that conversation. It was a little over [173] seven years after that statement was made by Mr. Rapelje, before any new viaduct was put at that point. As to whether Mr. Rapelje was speaking about his own views or whether he mentioned plans to raise the railroad track,—that plans were in existence,—will state that my recollection is he said, “That is on the plans”, or something to that effect, “at St. Paul”, or wherever the head office is; raising that track was on the plans, and that new viaduct. Whether I understood that he meant draftsman’s plans or engineering plans, well, I don’t know that I differentiated; he just said a “plan”. I had a picture of a blue print or something that he was going to do that; that was his business—not mine.

(Testimony of Joe D. Cullen.)

Recross Examination by Mr. McCarthy:

I said that this conversation as far as Mr. Rapelje was concerned, took place down underneath the bridge or viaduct over Wibaux Street. Mr. Rapelje did not at any time, walk down to the Beaver Creek bridge,—at least, I didn't see him,—unless he went down after he went up to his coach again. As far as I know, he never went down to the Beaver Creek bridge.

I am not a plaintiff in any of these actions against the railroad.

(By Mr. Maury).

Personally, I never did have any lawsuit of any kind.

(By Mr. McCarthy).

I didn't sustain any damage in the flood; I work for a company; I am an agent.

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WILLIAM E. MANNING,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is William E. Manning. I am at present deputy county clerk and recorder in Wibaux County. I was in Wibaux on [174] June 7, 1929. I was on the Northern Pacific fill during the morning of June 7, 1929. With reference to water on the



(Testimony of William E. Manning.)

north and south sides of the fill, I walked down to where that viaduct is and of course, looked on both sides. It appeared to me that the water was a good deal lower on the north side than it was on the south side; how much, it is all a guess. I have already guessed five to seven feet on the previous trial; it appeared to me that way.

I owned a building, a theatre, on Orgain Avenue at that time. There was plenty of change in the furniture, you might say, that took place during the flow; it was all moved around every direction. Another article there, after the flood, that I didn't have before,—I accumulated a tree in the front end, or chopping block, or whatever you want to call it. It was five to seven feet long and probably 18 inches through. As to how that got through into the building, from a hole that I found there, it apparently had broken through the two storm-sheds. This hole was on the north side. Surrounding the place where it got in, on other sides, there was a brick building on the east; a frame building right up against it on the whole length on the west, and a hollow-tile building a few feet back of it to the south. I found no hole on the other sides corresponding with that. The height of that hole from the ground was possibly four feet.

I saw a train standing on this fill that morning. I crossed through it,—a train was standing there. It would be pretty hard to say how many cars there were; I would guess there was 10 or 15. I saw servants of the railroad there, or men apparently



(Testimony of William E. Manning.)

in charge of that train; that is what I took them to be. I only saw one. He was doing about the same thing I was; he was walking along down the side of it looking at the flood.

Cross Examination:

(By Mr. McCarthy). [175]

My theatre building was directly west of the Albert Pickering pool hall, the next building to the Pickering pool hall. This opening that I speak of, that the tree—was on the north side of my building. The north side of the Pickering pool hall has glass windows; so has my building. My building has glass windows too. To my knowledge, the glass windows in the Pickering pool hall were not broken. I would say that Wibaux or Main Street is higher at the southerly line with Orgain Street than it is where it passes under the viaduct. So, after leaving Orgain Street on Wibaux Street, there was a natural slope as you went towards the viaduct; and it looks that way to me, that the ground north of the viaduct is lower than Wibaux Street at Orgain Street, so that naturally, water running down hill, would I presume, be lower on the north side than it would be on the south side.

Redirect Examination by Mr. Maury:

I never did see it such a difference before, of five or seven feet, in the distance of that railroad fill; that is the first and only time.

(Testimony of William E. Manning.)

Recross Examination by Mr. McCarthy:

Q. That is the first and only time you ever saw that amount of water before, isn't it Mr. Manning?

A. I never saw anything like it before, or since.

(By Mr. Maury).

I have lived there since March, 1911,—at Wibaux and Beach—I was in Beach, North Dakota; I was in Beach a while.

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K. M. ORGAIN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I have lived in Wibaux practically all my life. Orgain Avenue there is named after my father. You are pointing correctly [176] to my residence, where I lived. The Orgain residence is south of Orgain Avenue, west of E Street, east of D Street, and the most westerly house in that block, fronting Orgain Avenue.

I was city clerk of Wibaux, and was city clerk on April 3, 1923. That is my signature and J. D's (J. D. Cullen) too. I was city clerk also on March 7, 1923, and this is my signature; and that was Mr. Cullen's signature as mayor.

Q. The records show Mr. Orgain, that "the clerk was instructed to write to the superintendent

(Testimony of K. M. Orgain.)

of the railroad in this division and see what could be done to carry off the flood water in the vicinity of the elevators." What did you do with reference to that?

A. I performed my duty. I haven't any independent recollection at this time.

Q. And what was your habit as to that—doing what you were ordered to do by the council?

Mr. HALL: Mr. Maury, we have admitted that letter was received about the elevator, and the testimony shows we complied with it; and there is no dispute about that.

Mr. MAURY: Where is the letter?

Q. Mr. Orgain, I call to your attention in the minutes of the meeting of April 3d, 1923, some bracketed words—words which have been penciled, and which I now again pencil—who wrote those words, and when were they written?

A. I wrote them and they were written the 3d day of April, 1923.

Q. What was your habit of business, or what were your duties as city clerk?

Mr. HALL: We object to this line of testimony——

Q. Just a moment: And were you paid some compensation for your work as city clerk?

Mr. HALL: We object to this line of testimony as to his habits, and so forth, as immaterial for the reason that the resolution itself—the entry there—shows that [177] it is in no way connected with

the railway company, or that he was directed to give any notice to the railway company by such resolution.

We wish to cross-examine him in the absence of the jury on that question, before the court rules on that.

Mr. MAURY: He hasn't been asked any questions except as to his habits and his compensation and what his duties were. We will carefully protect you as to the contents of the records until the court rules. These are merely preliminary questions, I suggest to the court, that may be answered by "Yes" or "No", without giving the jury any intimation as to what is in that record.

The COURT: Do you propose to follow that up to show that notice was actually given, or is that merely a record?

Mr. MAURY: We cannot get the actual memory of the transaction from the witness. He was frank, sincere,—has always been; as to actual memory of having done that thing he has none. But he can only tell as to his custom, his habit, the duties of his office, and as to whether it was his custom to perform those duties.

Mr. HALL: In order for the court to better pass on our objection, I think the matter should be taken up in the absence of the jury. (Jury excused.)

The COURT: Well, I suppose if this were admitted, your records would perhaps show that you received a communication or you didn't, and that



(Testimony of K. M. Orgain.)

it was never carried out. That would be your defense, perhaps.

Mr. HALL: We, of course, deny that we received any such communication. At each of the other trials, this witness has testified that he had no recollection of having written any letter pursuant. (Take this down): And we object to the introduction of the resolution, or introduction of the minute entry being read to the jury for the reason that it does not direct the clerk to [178] notify the railway company. The resolution reads as follows: "The clerk was instructed to draw up a resolution asking the railway company to provide a larger water way under their bridge over Beaver Creek." The witness has testified at the other trial that he drew no resolution at all, and we contend that this minute entry requires the clerk to draw a draft of a resolution which should later be submitted to the Board for adoption or rejection, and the testimony shows nothing of that kind was done, and the witness has testified that he has no distinct recollection of having done so or written the letter. That being the case, we object to this witness testifying regarding it.

Mr. MAURY: The jury being out, we desire to proceed with a few questions to the witness:

Q. Mr. Orgain, what did you understand the drawing of a resolution meant?

Mr. HALL: We object to that. The record is the best evidence; he was "directed to draw a resolution."

(Testimony of K. M. Orgain.)

The COURT: What did he understand,—did he customarily do, when he got such an instruction as that from the council?

Mr. MAURY: Answer it freely now; the jury is out.

A. In fact, I performed the duties of my office and have never been “fired” or anything of that kind for not performing my duties. No one has ever charged me with being negligent of my duty. Neglect of duty has never been called to my attention by anyone. I understood from this instruction, that I was supposed to let the railway company know that we wanted a wider waterway through their embankment under the bridge.

Q. And having in regard your custom—what your habits were—what would you say to the court that you did when that resolution, or whatever those words mean, was passed? We don’t ask you, Orgain, for your independent memory for years, because we all know for [179] years, that you haven’t got it. But speaking from your habits—your own habits—your custom—your attention to business—what did you do?

A. Well, sir, I informed them what the town council wished as explained in those—

Mr. HALL: We object to that answer as not responsive to the question. It is assuming that he did give them something, when the witness says that he has no recollection that he did. He can’t “worm” that in that way.

(Testimony of K. M. Orgain.)

Mr. MAURY: We insist the witness be allowed to answer so the court can rule with the full knowledge of what the witness can testify to about it.

The COURT: Q. What was your habit in the ordinary course of business as city clerk, confronted by an order of that kind passed by the city council?

A. Well, sir, I would write that letter.

Q. What about the resolution? Would you draft it in the nature of a resolution?

A. I don't believe I would. I doubt very much if they asked for me to draw up a resolution. But it has been so long ago that I couldn't now be—I would be very foolish to swear that I remember writing this letter and mailing it. If it was anywhere else except on the witness stand, I would say I wrote that letter.

Q. But you haven't an independent recollection of it at this time, is that it?

A. No, sir, I haven't. I remember the discussion at the council meeting.

Q. How long were you city clerk?

A. A couple years; I don't just remember.

Q. You have received directions of that kind before, or of a similar nature?

A. I have. The minutes show there before that—I believe it does—before these minutes.

Mr. HALL: Q. The council draws ordinances. Ordinances [180] were drawn while you were city clerk?

A. I believe they were.



(Testimony of K. M. Orgain.)

Mr. HALL: My objection is, that this minute calls for the drawing of a resolution, without any direction that that is to be mailed to anyone; that if the clerk had assumed of sending something to the railway company, he violated his duty in doing so, because he hadn't been directed to do it. On the further ground that the witness has no distinct recollection now of having written a letter. Taking the entry of the day before——

Mr. MAURY: The month before.

Mr. HALL: The month before—March 7th—regarding the culvert there, it says: “The clerk was instructed to write to the superintendent of the railroad.” We admit he did write; we admit we received the letter; we admit we put in the culvert. Now, he is directed to “draw a resolution”; he hadn't been directed to send anything. So, to come in now,—and he says he hasn't any recollection of doing that—and when the minute doesn't direct him to send anything——

Mr. HALL: Q. You do have resolutions drawn by the city council in addition to the——

A. Yes; an attorney usually draws them, so I am familiar with the fact that if a resolution is drawn, it would be referred to the attorney; I do now. As to whether it would be the practice to take a vote on the resolution,—I do now, at the present time, at that time, I don't think I did.

Q. At that time, you thought a resolution meant a letter?



(Testimony of K. M. Orgain.)

A. I am not as smart as I thought I was. You brought it to my attention.

Mr. HALL: That is our objection. It was attempted to be put in at the last trial.

Mr. MAURY: He said at the very first—I have announced to every court that this witness, as for independent recollection, he has none. [181]

The COURT: Let me ask him a question or two?

Q. Now, through this book,—how long did it take you to use up this book? This is the book of the minutes of the council proceedings, is it?

A. Yes, it is.

Q. Were you the clerk during the two years, you say?

A. Two years, I should judge.

Q. Now, it appears in the other minute entry referred to a short time ago, while you were on the stand, that you were directed to write. Now, if you were directed to frame a resolution, what do you understand by that,—that you were to draw a resolution and submit it to the council at their next meeting?

A. No, sir; I didn't understand it that way. I would understand it that way now. But the idea was in my mind, and I think in the council's mind too, was to let the railroad know that we wanted a larger outlet for that water.

Q. Well, then the word "resolution",—when you are instructed to draw up a resolution, does that

(Testimony of K. M. Orgain.)

mean write a letter? Did that mean write a letter, in your mind?

A. It was.

Q. Where can you show any other instance where they asked you to draw a resolution and you wrote a letter, and that is what you considered it to mean? Something to illustrate that, so the court can see what you were going on and so interpreted it?

A. (witness looking through book). Here it is your Honor; it isn't a resolution. I was directed to write a letter. (indicating in book).

Q. When they directed "write a letter", they told you to do that, didn't they?

Mr. MAURY: There is something else. Was that ever mentioned in any meeting thereafter?

A. I doubt if it was.

Q. Any minutes of it, or was it ever to come back to the council?

A. None that I can see.

Q. You have examined these minutes. Is there any mention of that [182] resolution coming back, or was it supposed to come back?

A. There is none. I doubt very much whether it was supposed to come back. I can't find any place where I was instructed to draw up another resolution.

The COURT: Q. You can probably recall if the council were in the habit of instructing you in

(Testimony of K. M. Orgain.)

that way, ordering you to draw up a resolution,—meaning by that that you are to write a letter?

A. If they instructed me to draw up a resolution now, I would do it, or have it done. At that time, I doubt very much if they instructed me to draw a resolution.

The COURT: I think from the record of the examination of the witness here, I ought not to allow that to be read to the jury.

Mr. MAURY: There has been a sufficient offer of proof?

The COURT: Yes.

Mr. MAURY: And we except to the court's ruling.

The COURT: Yes; I will have to sustain the objection. Call in the jury.

(By Mr. Maury, continuing):

I can recall the incident of a horse swimming in the flood there on the morning of June 7th, 1929. The horse started, when I first saw him,—there is the ice house,—well, this horse was in a stable somewhere, and he came from this icehouse and he swam over to the railroad embankment, and a party went down here to catch him; he was tired and he was mired in the mud, but he got frightened and he turned around and swam up on this high ground here by the icehouse, without resting; it was an ordinary sized horse.

Mr. HALL: The icehouse is in what block there?

That (indicating) is the icehouse; I think that

(Testimony of K. M. Orgain.)

is it; that is just south of First Avenue South and west of E Street, and there [183] are two little houses there on the profile.

I can't recall when the sidewalks were first raised going to the Davis Addition; it was several years ago—several years before 1929,—I would say six or seven years. I recall that there is a building here, called the “Woodburn Building”, sitting on piles. I would guess that that building has been sitting up on piles 10 or 12 years. I don't know whether that building was moved from Main Street and First Avenue. The height of those piles, they are five feet—five or six feet.

#### Cross Examination:

(By Mr. McCarthy).

This icehouse to which I refer is generally in a southerly direction from my home.

Q. Did any buildings come down into—float or drift or were carried,—transported by the water—into the district immediately north of your home or immediately south of your home?

A. South, there were. One was a residence; it was a fairly good-sized house, seven or eight rooms; the outside of the house was yellow. I know just about where that house was located before the flood; it was in the vicinity of the city water tower.

Q. What were some of the other buildings or debris that came down there with the flood into your yard or just south of your yard?



(Testimony of K. M. Orgain.)

A. Well, there was what they call the Odd Fellows' Hall; it was turned around; it didn't float very far. I don't believe there were some posts or piling of some kind that stopped it; I think it lodged on the ground. Whatever distance the Odd Fellows' Hall moved, that was generally speaking, it was off its foundation, it had moved generally speaking, in a northerly direction.

This Woodburn Building that I speak of, is located right near the end of the spur track of the railway company. That building is used for a warehouse I believe,—Sawyer's store. Goods are received or taken from the warehouse and put into the railroad [184] cars, put in and taken out, both. They spot a railroad car alongside the warehouse, or they take goods out of the warehouse and put them in the railroad car, I suppose. It is important enough so as to have the arrangement such that they can have a level there, have the cars so they can run goods out onto the floor. There is piling at the easterly end of the building. I couldn't say whether those piles are as long as the piles at the westerly end of the building—I couldn't say about the westerly end; I don't know whether there is any under it or not. I believe you are right; I was mixed up, I got the ends turned around,—I believe it is a fact that the land at the west end of the building,—the Woodburn building,—is lower ground than the ground at the east end of the building; that they have simply put in piling there in order to level the floor of the building. Looking

(Testimony of K. M. Orgain.)

at the model of the Woodburn Building here, I believe the piling at the west end of the building is longer than the piling at the east end of the building, if there is any at the east end, and I suppose that the floor is approximately level with what would be the box-car floor.

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W. C. HOWARD,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I took pictures of certain scenes around Wibaux the day of the flood, June 7th, 1929. Plaintiff's exhibit 18 correct represents a scene that I saw there on that day; it is a correct view.

Mr. McCARTHY: They have all been received in the other trial. No objection.

Plaintiff's exhibit 12 is a true picture; 15 is a true picture; exhibit 14 is a true picture that I had seen; exhibit 10, another true picture; exhibit 11, another true picture, scene of the [185] flood. Exhibit 16 is a scene after the flood; that is near the post office; it is Mike Heckaman's filling station, Ole Helvig's shop. Those buildings all join there onto Nick Wagner's place of business. That picture must have been taken within the next two or three days after the flood; they were drying out

(Testimony of W. C. Howard.)

their merchandise there. Exhibit 19 is another true picture; the camera was on the embankment; I was standing right west of the viaduct; the camera was facing south and a little west; I was possibly two or three, or four or five rods from the viaduct, I couldn't say. That was taken—guessing at it, I would say around 9:00 o'clock maybe, on the morning of June 7th, maybe a little sooner.

There is another true picture, and this one. Exhibit 20 was taken after the one you just had shown me, because the water is deeper on the dwelling there. This was taken from almost the same point as the other one; I was facing southwst and on the railroad embankment west of the viaduct.

Exhibit 21 was taken from near the viaduct, the camera facing south; I must have been within a rod or two at the time that picture was taken, of Main Street. I don't know whether I can recall this object here or not. I seen that cow on there, and I was watching the water rise on there taking the picture; that was taken while the water was rising. That cow had to swim after a while. I couldn't say for sure whether that cow got up on something or whether that was another cow. Two cows got tangled up there, and another one at the Orgain building there, at the corner of Orgain Street. That cow got up on the platform somewhere around 10:00 o'clock I would say, between 9:00 and 10:00.

Exhibit 23 is another picture of Main Street; camera facing south. As to the time that was taken



(Testimony of W. C. Howard.)

with reference to the other pictures, I was taking pictures possibly about 20 minutes apart, until I had taken five—all the shots I had in the camera—I had run out of film. This wasn't the last one I took; I think [186] possibly the last one was taken of dwellings in the west part of town there. This same cow was in this picture, but a slightly different place from where she was in the other picture. That is Albert Pickering's store. They didn't move the automobiles after the water got that deep. I wouldn't say that that is the top of an automobile there; the top of an automobile would stick up farther out of the water than that object there.

I got up at possibly around 6:00 o'clock that morning—maybe a little before. I didn't see any wall of water. As to how observant I was of conditions, I was taking in the sights all the time until the viaduct—until the grade broke and the water went down; I was out on the grade continually, I guess.

When that picture, plaintiff's exhibit 22, was taken, the camera was setting right close to the county agent, Mr. Ostby's home, in the Davis Addition; that was in the 1929 flood. It was in the forenoon when that was taken,—between 7:00 and 10:00. This building that appears in the picture to be a little to the right of the water tower is what they call the Mattie Miller residence, or the green house. That is here on the map (indicating), this house; and I would say this is Ostby's house. The camera was setting here at Ostby's house and facing



(Testimony of W. C. Howard.)

towards the Miller house—facing west. (Ostby's is the house with the dyke on the north side and east side, and on Esther Avenue west of Beaver Street.) I didn't take that picture; I can tell where it was taken from though; I am familiar with the scene there, and I can recognize the buildings in it.

I was the assessor in 1928,—1929. Explaining the formalities that took place when I made Nick Wagner's assessment in 1929—what took place there,—how it was made,—I walked in his place of business to take his assessment just the same as I always have, as far as that goes, and told Nick I was "back again". I don't know just what took place as far as the conversation is [187] concerned. He says, "Here it is," and I put it on paper and he signed it. Everything except what was printed was in my handwriting, and except Nick's signature.

I was on the railroad embankment taking pictures there about every 20 minutes. It looked to me like there was seven or eight foot difference in height on June 7th, between the water on the south side and the water on the north side of the embankment. The highest was on the upper side or south side. It didn't remain very long at that difference in height; when it got to its peak, it wasn't long until the bank broke and it went down, and it went down fast. There is a lot of guessing there as to how fast it went down when the bank broke; it was probably a couple hours—maybe, I don't know—before we could get down on Main Street.

(Testimony of W. C. Howard.)

Q. About what time of day according to your best memory, was it when you could walk back on Main Street and near the Wagner place of business?

A. Well, it was sometime in the afternoon, possibly about 3:00 o'clock, before you could get back onto Main Street, because of a swale or draw on the west side of town; and when I went down onto Main Street, the water was two or three foot deep there when there wasn't any on Main Street. I couldn't see how many sections of the fill broke out; it broke away and broke away, and at one time, it seemed like there was an extra large portion of the fill went out; that was east of the viaduct on Wibaux Street there, not far from the depot,—100 feet or 200 feet or so. I don't know how much of the fill went out at that time. Altogether, I would say there was 100 feet, 200 feet, or 150 feet,—I couldn't say. I didn't see anything that day in the nature of a wall of water anywhere.

Cross Examination:

(By Mr. McCarthy).

When the railroad embankment went out, it crumbled and melted away, of course. But it went out in chunks too; I would [188] hate to describe it myself. When the so-called going out was completed at one place, I wouldn't want to leave the impression with the court and jury that the embankment went out so that it was leveled off completely. The embankment—the railroad grade—there, I should say was 12 feet in height maybe, I don't know.

(Testimony of W. C. Howard.)

Q. Whatever you meant was, that when it went out, a half of the embankment would go out, or better than half, but the complete embankment would not go out would it?

A. It kept breaking away almost to the level of the earth all the time as it went out—the embankment. It didn't work that way,—that is, times when part of the embankment would melt away—say the top two feet of the embankment; the water didn't affect the top two feet of the embankment, it wasn't up there; it had to come from the——

Q. The top would work down, would it?

A. Yes, sir.

Q. So, instead of having an embankment of a given number of feet after it gave way, you would have an embankment standing there of two or three or four feet less in height than it previously had been, is that the idea?

A. The embankment all washed out; there was a hole washed there where the embankment was 10 or 15 feet deep. That didn't all come at once; it had to eat out, of course.

Q. So, there were times when the embankment was about half of what it had previously been in height?

A. In that case, the top of the embankment would have to go first, wouldn't it? The whole embankment washed away and fell in to the level of the earth from the railroad track and kept breaking away in that way. Whether there were any pictures that I took that you haven't had the benefit



(Testimony of W. C. Howard.)

of here, will say that I think I only took five pictures.

I am still county assessor. I have held that office—this is my twelfth year. Before that time, I was a fruit-grower and worked on a ranch and farmed. I had been county assessor for about seven years when I made this 1929 assessment of Mr. Wagner's. So, in 1929, I was probably making my seventh assessment of that [189] store. I, of course, took an oath of office when I entered upon my duties as assessor—the same as any county official.

Q. And you lived up to your oath and did it to the best of your ability?

A. I should say that a person should.

Q. And you tried to?

A. In a way, yes; there is exceptions; we have one coming up.

Q. In assessing a stock in a store such as Mr. Wagner operated, it was your duty to assess the stock at full value, Mr. Howard?

A. That is what the law states.

Q. And you carried out the law to the best of your ability?

A. I don't think I did, in that particular case; I could mention others.

Q. Do you want to tell the court you violated your duties there in making the Nick Wagner assessment?

Mr. MAURY: Objected to as argumentative.

The COURT: Yes; that is a little argumentative.



(Testimony of W. C. Howard.)

Q. Mr. Howard, in making the assessment of the Nick Wagner store stock in 1929, did you fully and faithfully live up to your oath of office and follow the law of the State of Montana in so doing?

Mr. MAURY: Objected to as three different questions, and something that only a lawyer of very long, studious——

The COURT: I think he has answered that question already.

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EDWIN WEBBER,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Colton).

My name is Edwin Webber. During the years 1923 and 1924 I lived in the house just below the water tower next the creek bank, in the town of Wibaux, Montana. Pointing out where that house is on the profile map, it is right there (indicating). [190] In the spring of 1923 I observed the water coming down the street by our house, from the south, down this way.

Q. Going down E Street?

A. Right here, following this street——

Mr. McCARTHY: Witness indicating a point half way between the two white marks representing the so-called Senator Kinney cement wall on the

(Testimony of Edwin Webber.)

northerly side of Beaver Creek where the same is located about half way between the Miller house and the city water tank, as the point of beginning.

And following north on E Street to the embankment. I would say that I saw from a foot to 16 inches of water flowing down there at that time. I saw that phenomena twice there. The other time I saw that was in the summer of 1924. That water came from the creek over the embankment.

I was not in Wibaux during the 1929 flood, nor during the 1921 flood.

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MRS. DAN SUTHERLAND,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury.)

Where I lived on June 7, 1929, appears on the profile. This is the house right here; it is east of Wibaux Street and north of First Avenue North. On the morning of June 7, 1929, the water commenced to rise in my house somewhere after 10:00 o'clock—somewhere around 10:00 o'clock.

In 1921, I was living at another place. This is the house (indicating). That is the house north of First Avenue South and west of E Street, the third house from the southeast corner. As to what I observed in the way of running water during the so-called flood of 1921, near my house,—the water

(Testimony of Mrs. Dan Sutherland.)

was in the street there around two feet or so. It didn't remain there so very long; I [191] couldn't state the time. That water was coming from that street between—from the water tank down opposite from the barn there. That (indicating) is what I mean by the water tank. I am the wife of Dan Sutherland who has been on the stand.

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Testimony of

JOHN BAILEY

who had been first duly sworn as a witness in behalf of the plaintiffs at the trial of case number 2444, Wibaux Realty Company, a corporation, (and other cases) vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 6th day of January, 1934, was at the request of counsel for the plaintiff at this time, read by the court reporter, as follows:

“Direct Examination by Mr. Maury:

“On the morning of June 7, 1929, early in the morning, I was working in the First National Bank basement. Something out of the ordinary that came to my notice that morning was ‘very much water’. I first observed that ‘very much water’ as I came down from my residence—from where I lived, and crossing the bridge—the railroad bridge; I crossed the railroad bridge. I came down, I should think,

(Testimony of John Bailey.)

between 4:00 and 5:00 in the morning. The condition there then, at the bridge,—the water was quite high, and of course, not so high as it was an hour afterwards. I then went to the basement of the First National Bank; that is where I worked; I am janitor there of the building.

Q. How soon did you get to your work that morning Mr. Bailey?

A. Well, I think, as I stopped to help some parties that were in the tree——

Mr. McCARTHY: Just answer the question. \*

A. Somewhere about half past 5:00, I should judge.

I lived out here somewhere (indicating) and came across the rail- [192] road bridge to my work. The course that I took, I went north and I crossed the railroad bridge, as I could not get across the wagon-bridge at that time. I live on Davis Street. Indicating on the relief map where I lived, it was up here,—up here across from Massey's; I live on the hill from Massey's. When I got down here, I didn't cross on the county bridge and down the sidewalk, because there was too much water. As to the height of the water there when I went down in the morning—when I tried to get to town,—well, the creek was about bank-full. The ground to the east of the county bridge there when I started to go to work that morning, was under water. I would judge it was something like 200 yards under water then, reaching to the elevator on the other side—maybe a little more. I went around north to get to the



(Testimony of John Bailey.)

railroad bridge, and when I got across on the railroad bridge, I went west then on the railroad. I didn't go up as far as Wibaux Street; I went through the back way. The condition at the place where I worked when I first got there, there was no water there, and as far as I remember, I think it was something like half an hour, possibly an hour,—between 6:00 and 7:00, that the water began to come in from the north. I recall a concrete area-way back of the bank; I recall a wall; that wall runs north and south. The water that I first saw back there came from the north. As to how much of it came along when I first saw it,—well, it began to come over the wall probably two or three inches, and then it was a very short time that I see I had to get out of there shortly, and when I got up on the steps—on the ground, I should say, I think that the water must have been a foot or more. That is the same basement that Charles E. White's printing plant was in—connected up where I was working. I didn't see Heckaman and his wife leaving that morning. I was in the basement working and I just couldn't say what time it was that this water approached from the bank from the embankment—from the fill; I know what [193] time it came in; it was between 6:00 and 7:00. I went into the—I had a key. I stayed in the bank for a while putting up things and then went out of the west street door into the hallway that runs up to the bank office. By that time, when I

(Testimony of John Bailey.)

got there, I would think there was anyway three and a half or four feet of water on Wibaux Street. That was after I had fixed up everything. I would say that it was something like half an hour that I was working straightening up things in the bank.

Cross Examination by Mr. McCarthy:

When I went to work—when I walked across the railroad bridge—it was something like between 4:00 and 5:00. It was something like 4:00 o'clock when I got up that morning. Then I got my breakfast.

Q. And it would be 4:30 or more before you left home?

A. Well, we ate a hasty breakfast, as we knew about the water, my daughter having been out, we knew about the water and we was getting through as soon as we could. It was possibly half past 4:00 when I left home.

Q. You had to dress and eat your breakfast, and someone had to get breakfast?

A. We didn't have very much breakfast. We didn't stop for very much breakfast because we were considering the flood; that is what interested us. As to what I saw up there on the hill at 4:00 in the morning that indicated to me that there was likely to be a flood, the bottom of the valley was flooded; there was water on both sides of the river—creek; the bottom of the whole valley there was flooded. Pardon me just a minute,—there was no water in the town; above the town on the west side

(Testimony of John Bailey.)

there was water, and on the east side there was water in the flat.

Q. Yes, but at 4:00 o'clock you got up and you were living up here on this hill south of town and east of Massey, is that right?

A. I am east of town; I am north and east of Mr. Massey's place. I am up here on a hill that is southeast of town; it is on the [194] south or southeast; it is in an easterly direction.

Q. And at 4:00 in the morning you were worried about a flood away up here?

A. We seen the water,—shall I story? My daughter was out at about 3:00; she was up that night; she come home at 3:00; she was worried. There had been a big rain; and she got up at 3:00 o'clock and she announced to us, and that is the reason we got up early that morning. The water in the vicinity of Mr. Massey's place and where I lived,—we could look up there and see there was quite a lot of water in the low places. Pointing it out on the relief map where I looked, there was water (indicating).

Q. This group of houses over here on the relief map representing the Massey ranch?

A. There was water in the bend; it is rather low there; and then where we live on the hill east of town, and then there is a low place right in here,—we could see water.

Mr. MAURY: Indicating by the elevators.

But in the town there was no water.

(Testimony of John Bailey.)

Q. How about the water below where you lived and west of where you lived—below Mr. Massey's house?

A. I couldn't see below Mr. Massey's; I couldn't see below his place,—I should say, I couldn't see above his place.

Q. But as you looked across below where he lived, the whole valley across from the creek bed to the road going south——

A. No. There was quite a lot of water in the low places.

Mr. MAURY: In the low places, he said.

A. In the low places.

I intended to go across the county bridge when I started to town that morning. As to how close I got to the county bridge before I had to turn off, will say that I went directly from my house north. I see that the water in that low place there was quite a lot of water, and I see I couldn't cross the county bridge. I would say that I got a couple hundred yards likely, from [195] the county bridge before I decided I couldn't cross it. I didn't get down as far as the sidewalk that is on piles there; I went around by the railroad bridge. I am not much acquainted, to know what they call Esther Street and Beaver Street in there; I would not call them by name. I recognize the building here that is partially on piles—the Woodburn building—located near the southerly end of the elevator spur track. I didn't get as far on the road towards the county bridge as



(Testimony of John Bailey.)

the Woodburn building; I could have went closer than I did, but I went around.

Q. Do you think you got as far as the junction of the road to the south of the road, being the junction of Beaver Street and Esther Street, this point here (indicating), do you think you got as far towards the county bridge as this?

A. As I say, I went right north from my house to the railroad bridge. There is no road. I got onto the railroad embankment west of the stockyards. I got on the railroad about north of the elevator; I went between the two elevators; walked across the ground between the two elevators and got up on the railroad embankment. At that time, between the elevator track at the point that I crossed it and the railroad embankment there was some water; it was not very deep,—I imagine something like six inches possibly.

Q. About six inches of water at the elevator track at the point where you went half way between the elevators, where you left the railroad track——

A. I don't know as I went half way between them; I went between the elevators; it was closer to the northerly elevator. I kept above this low spot in here, and came across somewhere close to this most northerly pair of elevators to the railroad embankment. Having called my attention on the relief map to two objects, one representing a

(Testimony of John Bailey.)

loading platform, and this building here (indicating), that is where Mr. Heckaman's oil station is—not his oil station, but the Standard Oil station. I came up on the railroad embankment east of the oil building. [196]

Q. If you went between the elevators, then you must have walked northeasterly to get to the railroad track, is that it?

A. About very near north, but I came out on the railroad embankment east of the building that I refer to as the "oil building", and as I walked across this space between the elevator and the railroad embankment the ground was covered with something possibly near six inches of water. There wasn't any water over the county bridge at that time, but there was water between the county bridge and that low place—between my place and the county bridge. Pointing out on the relief map more definitely where that water was that prevented my getting to the county bridge,—this is the county bridge; the water butted right up to the track or to the elevator, but it wasn't to the bridge then, but it being low here there was water between there and the bridge so that I couldn't get across it,—that is, between the elevator and the county bridge.

When I got to the railroad track and reached the railroad bridge, water at that time was flowing freely underneath the railroad bridge. I couldn't estimate how deep the water was underneath the

(Testimony of John Bailey.)

railroad bridge at that time, only it was very nearly bank-full. At that time, it was flowing freely underneath the railroad bridge. [197]

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Deposition of

J. C. KINNEY,

a witness in behalf of the plaintiff, who had appeared pursuant to notice and subpoena on August 28th 1931, and who had been duly sworn to testify in this cause and on direct examination examined by Thomas C. Colton, Esq., counsel for the plaintiff, and on cross-examination by E. M. Hall, Esq., counsel for the defendant, was read at this time as follows:

Direct Examination:

(By Mr. Colton, reading):

“My name is J. C. Kinney—John C. Kinney. I reside at Tucson, Arizona. We moved there in fifteen, or the fall of nineteen-fifteen, the family, that is. I am still living there. I maintained a home here until probably 1923 or 1924. I suppose about eighty percent of my time was in Arizona. Before I went to Tucson, Arizona, I lived in Wibaux. It was Dawson County before it was Wibaux County. It was Dawson County at that time. I came to Wibaux in 1890, and I lived at Wibaux continuously, that’s my home since—until 1915. Beaver Creek was running through here at that time. At the time I came to Wibaux the railroad was coming through here.



(Deposition of J. C. Kinney.)

The nature of the bridge over Beaver Creek at the railroad crossing at that time was a wooden trestle bridge on piling. That bridge was changed afterwards. I am not sure when it was changed. Approximately, 1898, or probably 1896 to 1898. The channel above the railroad track, to the south, is a wide channel. It is a channel that has been there for years. Explaining the changes: the flood waters that came down changed the course of the stream and the Beaver Creek channel changed a good many feet since I came here. It keeps cutting the banks away and widening the channel. However, the normal channel of Beaver Creek when there is just a normal amount of water in it, is not wide. When there is high water, that is if snow melted or there were heavy rains, during high water, it would be a very wide channel. I have seen [198] Beaver Creek a quarter of a mile wide toward the east, from here at the bank over to the stockyards, during high water. When that water subsided after the high water, the nature of the ground when it receded, it is a gravel bed, not susceptible to cultivation; it is a sand and gravel formation that is left.

I had various lines of business in Wibaux. I came here as a cowpuncher. I was not a specialist in any line. I followed a good many lines. I was in the groceries and meats business and barber shop and livery stable and a banker. I ran my butcher shop on the east side of this street—Wibaux Street



(Deposition of J. C. Kinney.)

—where the Mercantile Building or the Wibaux Improvement Company Building is, where Nick Wagner is now. I ran the First National Bank here; I built that bank building in 1906.

At the time that I ran the butcher shop, the creek when there was ordinary high water, was pretty high. It had taken away the bank where my butcher shop was. We used to have a driveway in the back where we used to drive in with meat and provisions and the creek washed that away. The driveway was east of the building and west of the creek, and the creek ran right down there my way. From there it continued straight on north to the railroad on past the Wibaux property. It curved into the opening at the bridge from the Wibaux property. I should say the Wibaux property is, I suppose a hundred feet west of the opening. The water came down past the embankment of the Wibaux property and my property. I mean Pierre Wibaux's property. There is a wall there. I know that Pierre Wibaux caused it to be built, but I don't know who built it. That was built after I came. After the wall was built there, the creek run alongside of the wall. The creek has changed a lot since then; it is farther east now,—the main channel. I can tell you a lot about how the main channel happened to get changed. The railroad company put that channel in. The railroad company used gravel in surfacing the [199] roadbed. I remember it very clearly. It runs directly south

(Deposition of J. C. Kinney.)

from the railroad bridge, a little southwest possibly. As to how far it went from that channel, it went from near the bridge to what used to be our creek crossing and that's where the old crossing was from Dahl's blacksmith shop, they dug the channel to intersect at Beaver Creek at that point. As to why that was done, well, it straightened the channel. I had water in the basement while I was running the butcher shop in Wibaux, on the corner where Nick Wagner is now. I was acquainted with W. A. Orgain in the old days. He ran a store on the corner of Wibaux Street. I know that he had water in his basement. There were many people who had high water in their basements. The cause of it was, when the water would rise in Beaver Creek, it would filter into the basements.

Q. During those times, did you have occasion to observe the habits of the stream, during those times when there was high water? What was the habits of Beaver Creek?

A. It was good high water with lots of force, if that's what you mean.

From the fact that I had water in my basement of the butcher shop, I had lots of occasions for observation of the water in the creek. I have seen lots of floods in this vicinity. We were subject to downpours here, what you would call cloudbursts and on occasions of this sort, Beaver Creek would come up very rapidly. It would rise quickly and it had a great deal of force and water.

(Deposition of J. C. Kinney.)

Q. Did it go through the opening at the bridge during those times? Just explain——

A. Well, I stated before that I had seen this flat all over here covered with water. A solid body of water from here to the east. I have seen that a good many times. I would say about six or eight times, during all the time that I was here. Whether I observed the depth of the water on the south side of the embankment in comparison with the north side, [200] the south side was higher than the north side, that is, the water would check more or less.

Q. What would check?

A. Well, I suppose there is the approach to the railroad bridge. As to why the water was higher on the south side than on the north side, well, the approach was not sufficient to carry all the water through on an even keel and there was a volume of water at the approach as it was narrower than the flats out here in comparison and the water could not go through on an even keel or could not go through such an expanse much narrower on the same margin that it could have had there been no obstruction. What I mean by “expanse”, well, there is a quarter of a mile of level land here that the water would cover and as the approach at the bridge was narrow, it would naturally raise the water on the south side to a certain extent depending on the volume above it. I have seen it this way on several occasions.



(Deposition of J. C. Kinney.)

Q. Now, in connection with First Avenue South—do you know where that is?

A. Well, we didn't need names for our streets in those days, we were guided by the livery stable or the blacksmith shop. It is a continuation of the highway running east of the bridge. I was here when that bridge was built. In connection with the old channel, that bridge was placed east of the old channel, about a hundred feet or more. I don't remember exactly when that bridge was built, but I would say about 1908 or 1909.

Q. Now, those floods that you talked about, I believe you said six or more times, the water came down to the county bridge where there is a little fill, what course would the water take then?

A. If it was not too great a volume, it spread out, it spread east, of course, in some places it would spread both ways, but the volume would be east. I am acquainted with the old Woodburn Building over there,—an old warehouse. That was built I should say, from 1910 to 1912. It was an old building moved [201] from here and put on piling. It was near low ground on the water course, is how it happened to be put on piling. During the times I was here I have observed the bridge at the railroad embankment. I have observed the sides, where the water goes through at the sides; I know where the embankment is—where the water goes through. The embankment was a fill. That fill was composed of dirt fills. Where the water goes through, it is a dirt fill, I think.



(Deposition of J. C. Kinney.)

Q. I don't think it is a dirt fill, but right where the water washes through, did you ever notice any rocks?

A. Yes, the rocks protect it. It was rock riprap. There used to be rock riprap there or boulders. It was on this west side, I know that, I don't recall—I have seen the water extend over there on the Davis Addition where this Woodburn Building is, but whether there was any damage done on the Davis Addition, I don't remember. Naturally, Davis and I were pretty closely associated in business here and I seem to remember him having trouble over there with high water.

I said I was here in 1896 and 1893. During that time I remember one particular severe flood. I believe it was about 1893 in the spring when the spring thaw came and the creek broke up, there was an ice dam and it was pretty close to endangering the town and then the town turned out to help and it was eventually broken up by the section men by throwing joints of dynamite and it was broken up and the ice went through and the town avoided a flood.

When I came here in 1890, I noticed an old swale running down over west. That swale in my judgment, was an old river bed. It was low ground and apparently the old river bed. It connects with the creek back here back of the main part of town, with whatever street that is that runs back and forth, I don't know what street it is. It con-

(Deposition of J. C. Kinney.)

nects with Beaver Creek and runs north, [202] it runs north back of this part of town, Main Street, and it runs right into the railroad bank, I believe. It was that way when I came here. When there was high water, it was always full.

The valley down here by Beaver Creek is largely a rolling plain with evidence of high water and erosion and badlands and other things. During the dry seasons, there is very little water in the creek. Beaver Creek doesn't run constantly, some seasons Beaver Creek is almost dry. The climate here is of a dry nature but we have some extreme heavy floods in this part of the country.

Q. Now, explain how those come?

A. Well, I have seen water rise here——

Q. I mean by that fall of the rain?

A. Yes, it comes down so fast that you can't breathe if you are out in it. It comes down in sheets. The creek at those times comes up very rapidly. When there are heavy downpours, the creek always gets out of its banks, always."

Cross Examination (By Mr. Hall)

(By Mr. Jameson, reading):

"I said I came here in 1890. I was State Senator from this County from 1914 to 1921, that is, I was elected in 1914 and again in 1918. I was a member of the city council here for a period of time but not until eighteen, I don't recall, probably about two years. I think it was earlier than 1912 as I left here in 1915.

(Deposition of J. C. Kinney.)

Q. I think from 1911 to 1915.

A. I don't think so; I might have been, I don't recall just when I was a member of the city council.

Q. I am stating what this memorandum shows. Now, during the time that you lived here from 1890 to 1915, you state that you saw a good many high waters but at any time, not any of those high waters was high enough to run down through Wibaux Street, or Main? [203]

A. No. I spoke of an old channel, evidently an old channel sometime past, west of town here that came down towards the embankment and during the time that I was here that the upper end was filled in. It is a little lower there than Main Street, than it is on the south end of Main Street or Wibaux Street. High water continues to change this channel. It would possibly wash out a little of this bank and the result would be that it makes it a little wider between the banks.

Q. Now, the channel, as I understand it, back in 1890, at some point up where the wagon road is or further south than the present highway or First Avenue South, you spoke about the channel changing there?

A. No, it used to be down where the bridge crossing is, just around where the blacksmith shop was, directly east of the Wibaux Machinery and Auto Company, about a block south of the present one. In 1890, the water came from that point and then a little east and around and then along my



(Deposition of J. C. Kinney.)

property and the Wibaux property. That would be the supposition that it was on account of the high water that Mr. Wibaux put that wall there. The company, I said, dug out the gravel so that the stream coming from where the old highway crosses would run more directly straight to the bridge. And that would have a tendency to keep the water from washing the banks away from these buildings on the east side of Main Street. Of course, that ground between the old channel and the new channel was low ground. As a matter of fact, the valley south of the bridge where the baseball grounds are, it is a couple of feet higher than the channel, so that when the water rises two or three feet, it floods over all that low ground. Any high water would do that. But the fact that low ground was flooded from ordinary high water, that would never flood the buildings here in town. In fact, as you understand it, for a number of years, there was a pond there all the time that covered a number of acres, and that was probably due [204] to the little concrete wall that was constructed for the purpose of making a pond there. That was about three feet high, and as a result of that three-foot wall, north of the railroad bridge, I should say that it backed up water so that there was a pond of about twenty acres, and I had a boat that I used to ride around in; that was there for several years. Since that time, that concrete wall has been taken out. After that, whenever high water would



(Deposition of J. C. Kinney.)

come, it would cover that same flat of ground that was backed up by that three-foot concrete dam.

Q. Was it from that dam that the water backed up, that you said the water would seep into your butcher shop basement?

A. It always seeps into all the basements in town,—in the basements of the buildings where the rear end of the buildings butted into the bank there. We had basements six or eight feet deep; the water would sometimes seep in. As to it ever getting very deep, it would depend upon the duration of the flood, if it held up very long it would get quite deep in the basement. In ordinary times when there was no high water, I would say that the channel of Beaver Creek is only twelve or fifteen feet wide, and of course, this lowground of fifteen to twenty-five acres out south of the bridge, after the high water receded, would be covered with gravel and sand and would be practically worthless ground. I had trouble with water seeping into the basements of other of my buildings besides the butcher shop,—in the bank building and the new brick building. They were all on the east side; that is the rear end of those buildings that were out close to the channel, and the straightening of that channel by the railroad company throwed it further east and relieved the situation to a certain extent, and had a tendency to accelerate the flow of water so there would be less danger in town. The opening at the county bridge was not as large as that of

(Deposition of J. C. Kinney.)

the railroad bridge. This old warehouse, or Woodburn building, I [205] said was moved over to the present site about 1910 or 1912. That warehouse was used for the purpose of merchants unloading their stuff there; they unloaded their stuff from wagons. I think the building platform is on a level with the floor of the building. That building is situated east of Beaver Creek. I recall the water backing up there on the Davis Addition, but I don't recall that there was trouble at the Woodburn building.

This flood that I spoke of, in 1893, that was an ice jam. That ice gorged against the railroad bridge. It was not the county bridge. That old concrete wall wasn't there then, so it was not due to the fact that that old concrete wall was there. It was a case that when the ice went out, it gorged in such a manner that it backed up the water and the section men dynamited the ice and relieved the situation.

I haven't any idea of how long ago this old channel went down there. That channel has changed, no doubt. The nature of the valley here is like that of all eastern Montana. Beaver Creek runs down through the valley some thirty or forty miles with a number of tributaries coming in from all sides, a rolling territory.

Q. And the valley proper or the land is susceptible of plowing or agriculture?

(Deposition of J. C. Kinney.)

A. Yes. I thought Mr. Colton was asking me about the land below, north, there is not much difference, but he asked me about the land below and we called the land below north.

Mr. COLTON: I meant south.

As you go further north you strike the badlands and is mostly grazing country. If a person could get water to it, you could dry-farm it. During all the time I was here when I saw heavy rains and Beaver Creek was flooded and the land south of the track there for fifteen or twenty acres, I never at any time saw water get high enough to come down Main Street. I testified to [206] Mr. Colton's question that I had seen all of the flat country covered with water six or eight times, I mean from the road here to the rise at the stockyards, probably more than a quarter of a mile wide. I mean from the present county bridge to the elevators there, around the elevators. That ground is all several feet lower than the level of Main Street here."

Redirect Examination (By Mr. Colton).

(By Mr. Jameson, reading):

"I wasn't here in 1921 possibly sometime in 1921. I was here in 1929, after the flood. During those high waters that I talked about, that came very close to getting in Wibaux Street.

Q. Tell us how close.

A. Out here—we lived just across from this bank south. We lived across the street in that block.



(Deposition of J. C. Kinney.)

Q. South of First Avenue South, the street that crosses the bridge? On the street that crosses the bridge running by Nick Wagner's store?

A. We lived south of that in the middle of the block. I have seen water within six inches of the bank. That's on Wibaux Street. On the bank east of Wibaux Street, I have seen water nearly to the top of the bank. I should say that was about twelve feet deep. The stream would continue at that point, it would continue to go around to the elevators.

Q. Then during those heavy rains which you testified about, how deep would it be over the flat, I would say from the baseball grounds west to where the creek bank was?

A. Of course, the water varies in depth and then there are swales and low ground, but on the general level of that country, I would say about three feet deep.

Q. You testified on cross-examination that you used to row a boat around there, is that between the county bridge and the railroad embankment?

A. When I rowed the boat there, there was no county bridge. [207]

Q. How deep was the water where you rowed the boat?

A. I would go up the main channel, up one and down the other. I should think that water down here would be nine feet deep. It was that way all the time.



(Deposition of J. C. Kinney.)

Q. You just testified that the water would be about three feet deep?

A. I refer to the deep places. When you come over here by the Wibaux property you find a depression, I didn't mean the water was anything like nine feet deep, I was not able to row the boat except in the channel where we used to go swimming. The water that went through that railroad bridge would have to go over that dam. The water, in order to get into this swale, this one near the bank right there, would have to be extremely high to get into that, it would have to be a foot and a half from the top of the bank or if it came within two feet of the top of the bank, so it required a heavy body of water.

Q. You testified that the water went east, flowing east when it came down by the Wibaux property or between the county bridge and the railroad bridge and flooded those flats at the ball park. You said that the water spread out over the baseball park to the stockyards?

A. Beyond the elevators.

Q. How much higher were the elevators than the bed of the creek?

A. Well, I should think—they had a driveway there—and we have a pit in the elevator, now those pits where the machinery is, are not much higher than the bed of the creek, probably three feet.

Q. How much further east from the elevator?

(Deposition of J. C. Kinney.)

A. About two hundred feet, for the entire creek at that point is possibly not to exceed four or five hundred yards.

I testified that in these ordinary high waters that the water would come down the creek to the embankment and then spread out until it gave way at the opening of the bridge.”

Recross Examination (By Mr. Hall).

(By Mr. Jameson, reading): [208]

“As a matter of fact, if there had been no bridge or embankment at all, the heavy rains would cover all this low ground. I said that I was not here at the time of the 1921 flood, and I was not here in 1929. I still had property here in 1929. That was damaged. That is the house I spoke of east of Wibaux Street, the street running east, the present county bridge highway. I have not brought suit against the railroad company.

Q. Now, this bank you spoke of where you have seen water up to six inches to the top of the bank, that is the bank coming along the east side of town here, that is the south and east side, it would be the bank opposite your residence, directly east?

A. We lived here in the middle of the block, I mean the property where Drake’s store is, I lived there for some time, and I have seen the water up within six inches of the bank. I spoke that there might have been places nine feet deep when my

(Deposition of J. C. Kinney.)

boat was out there, I mean some unusual depression. But, of course, with the concrete wall only three feet high, it would go over the concrete wall.

Q. And the average level wouldn't be over three feet and as you went up the stream, it would decrease?

A. I think you will find that right under the bridge it is higher than it is here, of course, that is natural. Right under the railroad bridge you will find it higher than this old creek bed here. Of course, these estimates that I make as to the area of this ground and so forth, are just estimates on my part. Of course, I haven't been out in Montana and made estimates at different times; I just looked at it from the alley down here.

(By Mr. Colton): (Mr. Jameson, reading).

Q. You say that in ordinary high water it covers this flat about three feet deep or so?

A. What I tried to explain is that there is a general level, or a mesa and on that mesa as an [209] average, I should judge there would be about three feet, there would be general spots where this mesa was three feet under water, and then there would be spots twelve feet deep. I said the water would cover the entire territory that I refer to even if the embankment wasn't there."

(By Mr. Hall): (Mr. Jameson, reading).

"I have gone down there and made special observations when that water did come. I didn't figure the water was a little lower on this side. It has



(Testimony of John Presthus.)

backed up where it came on above the creek embankment on the west side of the creek.” (Signed by Mr. Kinney and sworn to).

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Mr. McCARTHY: Was plaintiff’s exhibit 22 introduced and received in evidence? It was introduced, I think.

(Mr. McCarthy handing the exhibit to the jury).

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Testimony of

JOHN PRESTHUS,

who had been first duly sworn as a witness in behalf of the plaintiffs at the trial of case No. 2444, Wibaux Realty Company, a corporation (and other cases) vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 9th day of January, 1934, was read at this time by Mr. Maury of counsel for the plaintiff, as follows:

“Direct Examination by Mr. Maury:

“I am the section foreman of the Northern Pacific Railway, at Wibaux; I am located at Hodges at the present time. Hodges is about ten miles west of Wibaux. I have been section foreman at Wibaux

(Testimony of John Presthus.)

since 1910,—23 years; was transferred to Hodges the first of December, 1933—just about a month and four or five days ago. I was in Wibaux on June 7, 1929, the day of the flood there. My house that I lived in with my family was located [210] just north of the Northern Pacific depot there, about 100 foot. The house that you are pointing to on the model is the house where I lived in June, 1929,—(this is the depot over here). (The house is immediately north of the depot across the track).

On that day water got up on the kitchen floor in the section house. It was just about one inch up on the floor, on the north end of the house.

Q. How deep was the water just across on the south side, at its deepest, Mr. Presthus? South side of the embankment at the railway?

Mr. McCARTHY: At what place?

Q. Opposite your house?

A. I should judge about ten feet.

Mr. MAURY: Do you wish any further of the deposition?

Mr. McCARTHY: No, I don't think so. That is, I reserve the right to look it over.

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Testimony of

TOM LEHIN,

who had been first duly sworn as a witness in behalf of the plaintiffs at the trial of case No. 2438, J. R. Bailey, et al., (and other cases) vs. Northern

(Testimony of Tom Lehin.)

Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 27th day of September, 1933, was read at this time by Mr. Maury of counsel for the plaintiff, as follows:

“Direct Examination by Mr. Colton:

“My name is Tom Lehin; live six miles west of Wibaux. I lived in Wibaux part of the time during the years 1896, 1897 and 1898. I worked for the Northern Pacific Railway Company at Wibaux, in '97 and part of '98; all of 1897 and 1898; was working on the section at that time. During the time I was working for the Northern Pacific on the section I observed storms at Wibaux in the Beaver Creek valley. [211]

Q. Just describe to the court and jury in your own words—take your time—what the nature of that storm was?

Mr. McCARTHY: Can you make it a little more definite?

Mr. COLTON: 1897.

It was no storm; it was just a break-up in the spring, and I started to work on the railroad about the first day of April, 1897, and that was an awful late spring that year and it didn't break up before about the first of April, and at that time it was quite a big flood in Wibaux coming down the Beaver Creek there, and at that time I was work-



(Testimony of Tom Lehin.)

ing on the section, and at that time, I don't know just exactly what date it was, but it was in the first week of April the creek come up so high that the water come over towards the railroad track on the east side of town—on the west side of town I mean. It come over down towards the track and then down towards the bridge again. Explaining more clearly what part of town it came over and where it come from: at that time it was west of town where the water comes down toward the railroad track.

As to whether there was an old swale on the west end of town at that time,—it was rough there anyway; I don't know whether any swale or not, but it was always rough there. That was west of Wibaux Street—west of the Main Street; and the water came down there. When the water came to the embankment on the west side of town, it went east towards the creek then—it went east towards the railroad bridge then. I could not tell you how deep the water was there, because at that time I didn't pay very much attention to it. Some water was coming down from the hills and part of it was coming out of the creek there. Naturally, it would come some from the cemetery hill and part of it was coming from the real Beaver. As to where it came from the Beaver—what part of town—well, I call it just straight south, not quite south, of the Catholic Church, but pretty near south of

(Testimony of Tom Lehin.)

the [212] Catholic church. That was near the water tower—where the water tower is now; that is where it came over. I couldn't say for sure now how much water came over there, but I should judge something between two and a half or three feet, it was coming across the track there.

A. After that flood, did you as a section man help make any improvements there?

Mr. McCARTHY: Objected to as immaterial, if the Court please.

Q. What, if anything, was done after the flood—you section men——

A. At that time, the track wasn't laying on a very high dump then and Main Street went right over where the viaduct is now.

Q. What, if anything, did you do about the viaduct?

A. After that flood, we got a job putting in a little culvert there, that went east and west along the railroad track there, where the viaduct is now."

"Cross Examination by Mr. McCarthy:"

(Mr. McCarthy, reading):

"In 1897 there was some water got down in Wibaux. It didn't come up south of the railroad track very far,—it comes from the south all right, but at that time, it was on the west side of town—to the west of Wibaux and just beyond the city limits. What you would mention as the city limits, there is a hill. The hill gets pretty high there; it is what they call the cemetery hill. North of the

(Testimony of Tom Lehin.)

cemetery hill there is the Wibaux monument; the cemetery hill is south of the Wibaux monument, and a little west, and of course, if it rained good and heavy—if it rained heavy over on that cemetery hill, the water ran down into the town.”

“Redirect Examination by Mr. Colton”:

(Mr. McCarthy, reading):

“It didn’t rain any in that flood, up on the hill; it [213] was just the water going off in the spring. I don’t know how much ground there is west of the swale and up towards Pierre Wibaux’s statue; I should judge 300 acres, not over 400 acres anyway. It is not so very many blocks from the swale up to Pierre Wibaux’s statue, probably three blocks; at most, four; and that hill is about that wide too.”

“Recross Examination by Mr. McCarthy”:

(Mr. McCarthy, reading):

“I couldn’t say whether the hill has got somewhere between 300 and 400 acres on it,—well, within 100 acres. It snowed during the winter of 1896 and early part of 1897. Part of the cemetery hill was covered with snow and ice during the winter—well, there was some there you know; of course, it blows off there you see. The snow that was there, when it got warm and melted, the water forming from the snow would run off like the rain water, but it wouldn’t take long to run off. When it melted and run off, it would make a lot of water.”



R. A. LYMAN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

Mr. MAURY: We offer in evidence defendant's exhibit Y-15 from another trial,—cross section at Brophy's.

Mr. McCARTHY: No objection. May I suggest: here is another exhibit.

Mr. MAURY: Yes; plaintiff's exhibit X-5 is now offered in evidence, chiefly for bridge and filling under bridge.

My profession is civil engineer. I graduated from Iowa State College, Ames, in 1907. I had quite a little experience before that in minor capacities in Iowa and Colorado,—in all capacities [214] probably, from chainman to engineer, all kinds railroad maintenance, construction and maintenance. After graduation, I went to the Des Moines City Railway as engineer, and later, assistant chief engineer on maintenance. Then I came to Montana and located near Wibaux for a while and later, near Baker; and in 1912 I went to Cuba as assistant engineer with the Guantanamo and Western Railway, six months later was made chief engineer, served as chief engineer for three and a half years, and practically, it was a construction job and later, maintenance. In 1916 I went with the Cuba Cane and Sugar Corporation,—engineer was my title. I had



(Testimony of R. A. Lyman.)

railroad location and sugar factory construction. In 1918 I came back to Montana and engaged in private engineering practice; about three years land classification; I was county surveyor during all the time in Fallon County, and ranching. In 1925 I went to Colombia, South America on railroad construction, and in the fall of 1926 I returned to Montana again and since, ranching and private engineering practice, and county commissioner of Fallon County,—I still am county commissioner. And right at present, I am field engineer for the “C.W.A.” out at Missoula.

I was called in the year 1931 to examine a condition at Wibaux and to determine, if possible, the cause of a certain flood that took place there in 1929,—June 7th,—I was employed by yourself and Mr. Colton to make a study of the situation there. I found, or was shown, a great many high-water marks of the 1929 flood; also quite a few of the 1921 flood. I measured the elevations of these high-water marks; took various—I think it was four—cross-sections of the creek; took a great many elevations of floors of buildings, streets, roads, bridges; measured and examined the railroad bridge as now exists, and the remains of a bridge that had existed before the flood; also the remains of a concrete dam just immediately below the railroad bridge; the present viaduct over Wibaux Street. I calculated the [215] drainage area of Beaver Creek, measured the slope of the valley, and studied it in a general

(Testimony of R. A. Lyman.)

way. As to what correspondence in the nature of a table of water I found as to the water marks of those respective floods,—I think I know what you mean,—will say that all that portion in town south of the railroad track was covered by a comparatively level lake of water, if you might call it that. It was remarkably consistent, the elevations, only a very slight rise as you went upstream or south, level transversely. By “transversely”, I mean east and west, or parallel with the railroad. Now, I would like to interrupt a minute: At all these trials this question has come up about this datum. What do you wish me to refer to?

Q. I wish you first, to tell how you arrived at your own conclusion as to the cause. Explain to the court and jury. I believe that will be the fastest way to get at it.

A. As I say, I found that the entire south portion of town,—the portion west of the creek and perhaps half of the Davis Addition had been covered with water at a certain depth, and that north of the railroad embankment, downstream, and east of the creek, the water was from ten to thirteen feet lower than it was on the south side and west of the creek, and north of the embankment there was a difference of between six and seven feet between the south side and north side of the embankment. As to what causes I expected at first might have brought that about,—well, I studied to see what possible causes there could be when a

(Testimony of R. A. Lyman.)

sudden variation takes place in an elevation of water in a flowing stream, practically the only two physical—the condition of the stream itself in its valley, would be a very sudden widening of the channel or valley or a very sudden increase in the drop or slope of the stream. That was the reason I took three sections in town. I made an independent survey in the region of Massey's house. I was going to go further: there was three sections I [216] took to determine the width of the valley and the water covered by it. I made one section parallel with the railroad about 100 feet south of the main line in the railroad right-of-way, extending from high-water mark on the east side of the creek to or beyond high-water mark on the west side of the creek. As to the length of that section, I can't tell you. I have the notes from which it was made, but I think 2600 feet approximately. Then I made another section on what is called First Avenue South, also parallel with the railroad, which I believe was 2400 feet long; that was from high-water mark to high-water mark. Then I took a section through a portion of the town north of the track. That I ran on a diagonal course with the object of making it at right angles to the creek opposite where the bend is shown there, and that section was I believe 2100 feet,—at least, considerably shorter than the other two, even assuming the water to be the same height, which it was not. It actually, from high-water mark to high-water mark was about 1400 feet, I believe,



(Testimony of R. A. Lyman.)

and I checked the slope of the valley and I found no appreciable difference in the slope. So, the only two possible causes which might exist did not, and would only leave the railroad embankment as the cause of that extreme difference.

The width from high-water mark to high-water mark at Massey's place was 600 feet. It did not include that water to the east of Massey's house, that was a comparatively trifling stream. If you wish it, I will give you an explanation of how that was there,—how that got there: As the relief map shows, there was a sharp bend in the creek, and at the time of the flood, as I understand, it was even sharper than shows on this relief map; at any rate, there is a sharp bend there—more than a right angle—the flood stage had put this water up practically to this bank, and what you call the energy of the water, would simply lift it, splash over it, in other words,—rather than make the sharp bend, it [217] would splash over. As near as I can tell, it had gone down there in a sheet a foot or——.

The depth of the water at Massey's on June 7, 1929, in the main channel of the creek was practically 11 feet I think; that is from actual measurements. In taking the measurement of the depth of a thing like that, that is what we call taking levels and simply comparing one point with another, an arbitrary bench mark as we call it.

Q. I know, but do you use the level of low water in the stream or do you use some hole in the ground? For the creek channel?



(Testimony of R. A. Lyman.)

A. Perhaps, I would take the level of the hole in the ground, but I wouldn't call that part of the creek channel. As to what I base my measurement of 11 feet there from, will state that in my particular case, they practically coincided—there was only one inch or so; it was a very trickling stream there; they would be the same. The valley sloping up from the thread of the stream or the high water there,—the condition was that it was practically a curving channel, saucer-shaped channel; there was very little of any one depth. Pointing out on the profile here about where my cross-section of 600 feet from high-water mark to high-water mark went, I presume it was right across there (witness indicating a line running more or less north and south from the nearest portion of his barn).

One of my cross sections is right by Nick Wagner's place, in the street. The length of that cross section from high-water on the west to high-water on the east was 2400 feet I believe. In regard to the height of the ground at Massey's house above the level of the stream or the bottom of the stream at low-water, I have some notes here (referring to notes),—I have the ground at Massey's house  $24\frac{1}{2}$  feet above the extreme bottom of the creek.

Q. Under the bridge or where?

A. Pardon me. That is referred to the bridge down here. I think I have it the other way too.

[218]

(Testimony of John Oien.)

Mr. MAURY: We would like to place Mr. Oien on the stand for a few questions and we will shorten the case I think.

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JOHN OIEN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I am an engineer in the employ of the Northern Pacific Railway Company. I have been in their employ almost 29 years and I am working on the Yellowstone Division; that embraces Wibaux. Soon after June 7, 1929, I went to work at Wibaux for the company. I took certain high-water marks. At that time, they were apparent on the land from the railway fill south as far as Brophy's place. The first place above town is Massey's. I think there is another place in between Massey's and Burke's; Burke's is south of Massey's anyway; then south of Burke's is Parker's, and south of Parker's is Brophy's. Brophy's is about five miles from the fill, straight.

At Brophy's, I took data for this cross-section which you are showing me, and I took data for the high-water marks of 1921 and the high-water marks for 1929; the yellow color represents the high-water marks of 1921 and the green that of 1929. As to the distance across the valley the high

(Testimony of John Oien.)

water extended in 1921, I would have to measure (this is Y-15 the exhibit of the defendant in the former trial, in January, 1934, that has been offered in this case). It was about 1200 feet in 1921. There is a little yellow over there (indicating) about 80 feet. Apparently, the river was out of its banks in 1921. The water was 3.3 deeper in 1929 at Brophy's than in 1921; that was in midstream and all across. The height of the water in 1921 in the deepest part of the channel was 13 or 14 feet.

I made another cross section at Burke's place for 1929. I [219] don't recall the length of it. I haven't the notes with me. I will have them here for you tomorrow morning.

Q. I call to your attention testimony at the bottom of page 536 (Transcript on Appeal, Case No. 2438, Bailey, et al., and other cases, vs. Northern Pacific Ry. Co., tried at Baker, Montana, in September and October, 1933), could you from that, tell us how wide the water was in June of 1929, at Burke's place, immediately above Massey's, or possibly not immediately,—there may be a place between?

A. Yes; the deepest water at Burke's place was 17.4 feet and the water was 420 feet wide there.

Mr. Lyman and I have often compared measurements and elevations, in court.

Q. Now, there is a difference between your elevations and his of two feet, is there not? I mean of the survey around Wibaux?



(Testimony of John Oien.)

Mr. HALL: 26 feet isn't it?

A. 26 feet, yes.

Q. Is there a difference of two feet between your measurements from under the bridge, and his?

A. From under the bridge, yes. Whatever he says is—for instance, 13 feet above the point under the bridge, if it is around Wibaux here, would according to my measurements, be 15 feet. The reason for that, I presume, is that we took the sections at different times—different years. I took the elevation under the bridge pretty soon,—a couple months—after the flood of June 7, 1929. It is possible that the bed had raised some in two years afterwards. When I measured for the depth of the water at Massey's place, I took the elevation of the creek-bottom and also the water-level at that time. I don't remember,—I couldn't tell offhand how close a correspondence I got between the two; I will have that here for you in the morning; will bring my notes up tomorrow morning on the entire survey; will also produce that cross section of Burke's, that has been reduced to a cross-section plat. [220]

I have a cross section a half a mile north of Mr. Brophy's place; I made a cross-section there on the highway,—on the east-and-west highway. I will produce that in the morning.

Q. Have you got cross sections showing depth of stream from Brophy's down to town?

A. A profile you mean?

Q. Showing the depth of stream—width,—width as well as depth?

(Testimony of John Oien.)

A. At certain points I have that. The cross sections show that. I will bring them all up here tomorrow morning.

Cross Examination:

(By Mr. McCarthy).

So that we get it clear, a cross-section, that we have been talking about here, is a drawing you might say, showing the elevations of different points along a certain line. Supposing there was some water here in the courtroom and I found that the high mark of the water on this wall was up to the seat of this gentleman's chair (No. 12), I would expect the water would be level, and I would get the high mark on the other side of the wall that it came to and those would be the limits of the water. Of course, on the ground where there are various slopes, I get the extreme, if I take a cross-section there that runs north and south, I get the mark to the west and the mark to the east, of the high water, and the bottom line of the so-called cross-section is the ground-line and the top line is the water-line; it is really a theoretical slice out of the ground and the water. Now, on this exhibit—this cross section taken at Brophy's place—showing the court and jury where the high water in 1929 extended from and to,—it extended from this point on the east to this point here on the west. Showing where the 1921 high-water was,—where there was any water in the vicinity of Brophy's cor-

(Testimony of R. A. Lyman.)

responding to the same cross-section, in 1921, it was from this point on the east to this point on the west, and a small portion at the other end. [221]

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R. A. LYMAN,

recalled for further direct examination, by Mr. Maury:

Q. Mr. Lyman, I believe I asked you what the elevation at Massey's house—I mean the ground right at Massey's house—was above the bed of the stream, right opposite his house? (witness figuring). By bed of stream I mean level of water at low water?

A. I get it just 14 feet.

Mr. McCARTHY: Where is the 14 feet you are referring to?

A. The ground at Massey's house is 14 feet higher than low water in the creek right opposite his house.

When I examined or measured it, there was practically no water there; the bottom of the creek and the channel coincided practically, just trickling through the pebbles.

Q. We have referred in previous trials as the point B being the point under the Northern Pacific Railway Company bridge. How high above the point B is the land at Nick Wagner's?

A. Mr. Maury, I am going to suggest that I used Mr.—the two-foot difference as explained by



(Testimony of R. A. Lyman.)

Mr. Oien, so there is no confusion,—it amounts to the same thing,—and I am going to add two feet to all my readings to make them coincide with Mr. Oien's. I am sure there had been a fill between June 7, 1929, and the two years afterwards that I got there; I am sure Mr. Oien did it right; it wasn't anything complicated to get, so I know he must have had a deeper place to measure than I did. His information being closer to the time, the starting point would be better than mine, to take it, so there would be no confusion.

The land at Wagner's place of business at the corner of First Avenue South and Main Street, is just 15 feet higher than the point B. I have seen an exhibit and diagram of the county bridge as it existed there as prepared by the railway company.

Valleys are formed, the stream in almost all cases forms its own valley in the course of years. As to what relation the [222] size of the watershed has to the size of a bridge over a particular stream and the requirements of the bridge, generally speaking, it bears direct relation—the bigger the watershed, the bigger the bridge. A great many formulas have been devolved for that, taking in that and other features. The railroad company's bridge as it existed there on June 7, 1929, consisted of one 70-foot span with two approach spans of 20 feet. The approach spans had been filled on a slope down from the top of the abutment to the base of the pier, leaving a clear waterway of about 65 feet between

(Testimony of R. A. Lyman.)

piers, plus a triangle under each approach span as the water got high.

Q. How high were the banks, as close as you could judge from your examination on the ground?

A. The banks at that place are hard to define. The east bank is very high and steep. The west bank, it is harder to say exactly,—“Here is the bank”, but I would say as near as you could get at such a thing,—six feet maybe would catch the—I don’t know—I would rather see that profile that was introduced, if you wish me to testify to that.

Mr. MAURY: We offer in evidence this exhibit (plaintiff’s 26), from the other case.

Mr. McCARTHY: I have no objection to Mr. Lyman referring to it, but owing to the confusion between the horizontal and the vertical scale,—I object to it on account of the confusion.

Mr. MAURY: We offer it in evidence.

The COURT: Very well.

Mr. McCARTHY: It would be very confusing to anyone but an engineer and we object to it for that reason.

Mr. MAURY: I think the jury can understand it with the explanation.

The COURT: I think the jury can understand it. Overrule the objection. [223]

A. I might suggest, Mr. Maury, if you will give me the width of the stream for any height, I could get at it in a better way.

(Testimony of R. A. Lyman.)

Q. Can you tell from that profile how wide it was between the banks of the stream at the bridge when that profile was made?

A. You would have to specify in that question what you mean by the banks; the banks of the creek at different heights, would be a difference, or a flow of so much water to catch the banks. To get anything like a flood flow, the banks are about 600 feet wide at this point. About a 10 or 11-foot flow would show banks of 600 feet wide in the banks at the time the profile was made. I don't notice any difference between the profile that I have here and what has been called the relief model here at the bridge; I think they coincide pretty well, as near as such a map could be made.

Q. Will you examine and see if from the profile there, whether the banks of the stream correspond with it—whether the east bank corresponds with the profile?

A. No; I see what you mean; there is quite a little difference there. The profile indicates that the east bank of the stream, which was well defined, was probably 200 feet east of the east end of the bridge.

Q. And how as to the west bank?

A. I would like to modify that first. It is about 400 feet on the west, from the west abutment of the bridge to the first pronounced bank and only about 100 feet on the east side rather than 200, which I just said.



(Testimony of R. A. Lyman.)

I found the nubs of an old dam here on the ground. They correspond with the bridge, in feet, on the ground,—the east end of the dam is about 50 feet east of the east abutment of the bridge; that would be 70 feet from the east pier. The west side of the dam corresponds with the bridge very well, (referring to notes); the west end of the dam—the remains of the dam—show it to be about 8 feet west of the west abutment of the bridge, and that would be approximately 28 feet west of the west pier. By [224] “piers”, I speak of the two inside columns of support; “abutments”, I mean the extreme supports.

I have lived above Wibaux in the Beaver Creek valley about 20 miles. Describing what kind of a country that is for storms, it is a so-called semi-arid country, fairly high altitude,—the type of country that we know is subject to violent storms. I have seen some of those storms. There is no regularity at all with which streams get out of their banks there; they frequently do,—sometimes the melting of the winter’s snow and sometimes, if it rains, it is pretty apt to be in May or June, and sometimes in the fall. The river there above Wibaux is probably 50 miles long without counting meanders. As to meandering it is a very crooked stream; probably the length as measured along the stream itself would be perhaps, nearly twice as long as the distance measured right straight up the valley, perhaps not quite that much, but nearly twice I would

(Testimony of R. A. Lyman.)

say. That contour and the course of the stream exists for 30 miles, in a general sense, along the stream from Wibaux all the way up; I don't believe it is as crooked after the first 30 miles from Wibaux up; from Wibaux, up 30 miles, I believe it is about the same character as at Wibaux; from that point on to the head it is perhaps not so crooked.

I have an elevation of the lowest point of the stockyards spoken of in the Kinney deposition; the stockyards sit on a hill and I took the lowest point down the hill to which the stockyards reached. That is 22.1 feet above the point B.

I have the elevations along the roadway from the county bridge to the elevators. Along that county road there, I said at a previous trial that I believe the model doesn't show quite the dip that actually exists there; it would be hard on a small scale, to check it up.

Mr. MAURY: We offer in evidence this exhibit Y-4. It is a cross section offered by the defendant at another [225] trial, "Profile First Avenue South, Wibaux, Montana."

Q. Can you tell us from that Mr. Lyman, the area of water, or area for water, that the old county bridge gave? The one that was there on June 7, 1929?

A. Yes, sir; up to the——

Mr. HALL: It was taken after 1929 wasn't it?

(Testimony of R. A. Lyman.)

A. It shows the bridge as existed previous to the flood—washed out,—they have it marked here as an area of 920 square feet.

Q. And what other escapement for water appears? How much appears there?

A. East of there, they have an area—these areas are for the 1929 flood,—is that what you wish?

Q. I wish the top of the bridge area and a level running to the east from the top of the bridge,—what was the entire area that water could escape through there?

A. Without going over the bridge?

Q. Without going over the old county bridge?

A. They have it marked, the sum of 920 and 2230,—it would be 3150 feet.

Q. How does that correspond with the area for water to go through the old railroad bridge that existed there on June 7, 1929?

MR. McCARTHY: That is objected to, if the Court please. If he wants to compare the area under the county bridge with the area under the railroad bridge, there is no objection. Now, he proposes to go outside of the county bridge, and taking in the possibility of an overflow and compare the possible overflow of the area of the county bridge with the area of the railroad bridge. If you will compare the area under the county bridge with the area under the railroad bridge, there is no objection. This is not a proper comparison.

THE COURT: I don't know if that is his object altogether.



(Testimony of R. A. Lyman.)

Mr. MAURY: No, sir; it is to show the provision that others made for water there.

The COURT: On account of the height of the roadway you mean, and the height of the bridge?  
[226]

Mr. MAURY: Yes, sir,—the proof that in high water, the water flowed around the county bridge over that area.

The COURT: I will overrule the objection. You may show it.

Mr. McCARTHY: Note an exception.

A. At the same flood stage, corresponding water, there is an elevation (area) at the railroad bridge of 810 plus a little—I couldn't say how much it would be—those two triangles—as against 3150 at the county bridge and east of the county bridge; about one-fourth.

I never saw the viaduct so called, as it existed before the flood; I seen it as it exists now. The floor of the viaduct is 11 feet above the point B. It has been testified to how much space for the flow of water existed through that viaduct, but I don't remember it. No part of the flood of 1929 got up as high as the so-called children's viaduct.

I have elevations on the water-level north of the fill. I took elevations of high-water marks at the community church. I took the elevation of the section-house floor, which is practically a high-water mark as testified to by the section foreman. I have those close on the west side of the creek. I have

(Testimony of R. A. Lyman.)

the high-water mark at the tourist camp, or Lentz's house, on the east side of the creek. The floor of the section house is 5.7 feet lower than the high-water mark immediately south of the railroad embankment.

Mr. HALL: What is the elevation of the section-house floor?

A. How do you wish it? Your datum?

Mr. McCARTHY: Sea-level datum?

Mr. HALL: Point B on your corrected datum?

A. 14.2 above point B.

Mr. McCARTHY: Q. While you are at it, what is the highest elevation that you found of water on the south side of the embankment?

A. I got it gradually higher [227] as you go up the creek.

Q. I mean right at the embankment,—the railroad bridge itself, what was the——

A. I have none close. I have them all in the business portion of the town; I have one which is identical.

Q. There is none at the embankment itself, or at the railroad bridge?

A. No, sir.

Returning now to the north side, the mark at the section house would be 14.2 feet above point B, and the high-water mark at the church was 14 feet above point B. The high-water mark in 1929 at Lentz's place was 8½ feet above point B. Lentz's place is not on the map; I believe it is something like 800

(Testimony of R. A. Lyman.)

feet north of the railway fill; it is in line with what would be the next street here reduced, perhaps three inches off of the edge of the map.

Pointing out on the map the outlines as they appear on the ground, of what has been spoken of in the evidence as the slough or the swale, it is as has been described, I think, an old river channel. The old channel leaves the present channel somewhere near and east of the water tank, about here (pointing), being four inches east of the water tower; then it goes due north by a very meandering course due to the intersection with the railway embankment, and carrying on in the same condition, on north, and intersecting with the creek below town probably half a mile north of—When one stands up on the railroad at a point about opposite the Orgain house, the outlines of the slough are visible both north and south. There has never been any culvert at the slough so far as I ever knew, and none exists there now; and none existed there in 1931 when I first examined it.

I don't think I took an elevation of the sidewalk here above the flat (Beaver Street sidewalk). I would say its height above the flat is five or six feet on an average, probably eight or [228] nine feet at the deepest part. It was up on piles, and so that water can go under it. The width of that low place there on the profile on the land, measured along First Avenue South, is about 600 feet.



(Testimony of R. A. Lyman.)

The purpose of riprapping in railroad work is that it is protection to a fill—protection from erosion—and when it is used close to a bridge or stream, its purpose is to protect the bank or whatever bank,—fill, or whatever it is placed on,—to protect it from running water.

Q. Returning to the subject of formulas, do you know of any formula in any engineering work, having in mind the width, the size of that valley, the character of the soil, its barrenness, and its declension, which that bridge of 65 feet or a little more, that you have described, lived up to?

Mr. McCARTHY: Objected to, if the Court please, as not being a proper hypothetical question if he doesn't know.

The COURT: Well, if the witness understands it——

Mr. McCARTHY: He hasn't yet shown us any formulas that he claims exists, or anything of that kind; no foundation laid. If the Court will understand our position, we contend there are no formulas for bridge openings; there are formulas for culverts; there are no formulas for engineers, in the construction of a bridge.

The COURT: I don't know; it seems to me that in order to find out, you ought to formulate some question taking in a little more definitely the conditions that exist there.

Q. Yes. Mr. Lyman, are formulas found in engineering books,—treatises that the engineers study,

(Testimony of R. A. Lyman.)

indicating a correspondence of some kind between a bridge opening and a watershed?

A. There are a great many such formulas in a great many different books.

Q. Have you examined some of those formulas with reference to the [229] size of that bridge and this watershed?

A. I have computed the flow of water or the size of bridge opening, from perhaps eight or ten different formulas, according to the manner in which they should be used. Naming some of those formulas, I only have three of them here I believe; Dickens' formula is one. Do you wish me to give the formulas as I read them?

Q. Yes. What size bridge opening would Dickens' formula require in that watershed?

A. Using Dickens' formula in the way it is recommended by the author, would indicate a flow of water to be expected at 23,700 cubic feet per second. Formula by Ryves,—I don't know how it is pronounced——

Mr. McCARTHY: We have no objection to his authenticating Dickens' formula and then tell us that he applied that formula. I never heard of Dickens; the engineers tell me they never did either.

The COURT: Identify Mr. Dickens, tell us who he was.

Mr. McCARTHY: We object at this time as an attempt to inject hearsay testimony before the jury.

The COURT: You can bring that out on proper examination in detail.

(Testimony of R. A. Lyman.)

Mr. McCARTHY: The objection is, no foundation laid and an attempt to introduce hearsay testimony.

The COURT: And quoting some known authority in the engineering world.

Mr. McCARTHY: The objection is there is no foundation laid and an attempt to inject hearsay testimony in the case.

The COURT: I think you should lay some foundation showing who the author is.

Mr. MAURY: We laid that foundation. We asked if there were formulas placed before the profession, or treatises——

The COURT: Well, what is this treatise by Dickens?

Mr. McCARTHY: If they will tell us who Dickens was and what [230] his formula was, we have no objection.

The COURT: Well, proceed with your formula; I think he has the work there.

A. This is a work by Wilson on Irrigation, in which he quotes many formulas. I have heard of Dickens' formula many times before. Wilson is a recognized irrigation authority I think.

Mr. MAURY: Of course, in Lagrange we were referred to Pythagoras; we were given several good formulas on geometry; we couldn't tell you anything about Euclid's reputation.

The COURT: Proceed.

A. Do you care to have me read?



(Testimony of R. A. Lyman.)

Q. Yes.

A. "D equals C times the fourth root of the cube of M, in which formula D equals the flow to be expected in cubic feet per second. M equals the drainage area in square miles, and C equals a constant, which depends on the character of the country, ranging from 200 for a flat country to 300 for a mountainous country," and I used a value, ranging from 200 in flat country, for a maximum of 350—I used 300, giving a result of 23,700 cubic feet per second,—flow to be expected. Formula by Col. Ryves, derived from study of rivers in India, give "D equals C times the cube root of the square of M," where the letters represent the same thing as in Dickens, with the coefficient varying from 400 to 650. I used 600.

Mr. McCARTHY: We ask that the reference to the Ryves formula be stricken there. He says it is based on studies made in India.

Mr. MAURY: Euclid made all his studies in Greece.

Mr. McCARTHY: Note an exception please, to the declination to strike.

Another formula used was that of Mr. J. T. Fanning. His was found [231] from study of the flood discharges of various American streams. His formula was that "D equals 200 times the sixth root of the fifth power of M." By that formula you would expect 25,800 cubic feet per second; Dickens' 27,800; Ryves 29,400. Two years ago I tried various

(Testimony of R. A. Lyman.)

other formulas, but I can't give the figures on them. I tried Talbot's formula; I can't give the names of others.

Mr. McCARTHY: Myer's?

A. Myer's formula, yes.

I have calculated, using partly Mr. Oien's data comparing it with my own, the maximum flow of water by Massey's on June 7, 1929,—at the previous trial computed that the flow past Massey's was 15,813 feet—call it 16,000 cubic feet per second.

Q. That was the maximum according to your computations and from data of your own and Mr. Oien's?

A. That was based on cross-sections which I took, my own idea as to the constant and Mr. Oien's data as to the slope of the stream.

Q. Have you been able to find any formula that would indicate that a bridge there at the time before June 7, 1929, would carry what would be expected——

A. There was one formula I think, it was Myer's I think it was a low coefficient, showed the bridge to be sufficient. No other formula came anywhere near to it. I believe it was Myer's. By using a low coefficient, showed it to be near ample, but no other formula. I don't even remember Myer's formula now; I can dig it up. We do have coefficients, of course, to take care of the type of the country.

Q. How much water should have been expected by an engineer to flow past that bridge even with-

(Testimony of R. A. Lyman.)

out any previous history of the stream, in your opinion, knowing of the size of the watershed and the character of it?

A. That is a little difficult question to ask. If you are going only by formulas, the bulk of them would indicate from 25,000 [232] on up. I have one, another that 100,00 cubic feet per second should be expected. I shouldn't say that an engineer should use formulas, if he has other data. If you want to be perfectly safe, use the one which indicated the maximum. If all formulas indicated more than previous floods, I would give them the weight.

I have seen the record introduced at a former trial by the Northern Pacific—I saw the exhibit—where in 1900 the high-water mark was shown to have struck the girders of the bridge. As to how high that would be above the bed of the stream, it would be approximately 15 feet up.

Mr. McCARTHY: The record would be the best evidence on that.

A. 13 feet I guess.

Q. If that had continued at that height for any length of time or for a sufficient length of time, what would have happened to the town of Wibaux in 1900—where it struck the girders——

Mr. McCARTHY: Objected to on the ground no foundation laid. The record is not here in evidence.

The COURT: Yes; we don't know much about the town of Wibaux in 1900.



(Testimony of R. A. Lyman.)

Mr. HALL: It wouldn't even reach the town, the witness testified 15.2.

There would undoubtedly be a complete closing if the water struck the girders. The distance from the ties down to the bottom of the girders, as it existed there, and the kind,—it was a steel I-beam girder, and I think seven feet; I believe that was the testimony. I have seen it, in another structure, in another place; it forms part of the present structure, but not the part over the main stream. From tie to bottom of girders it is about seven feet I think. It is solid steel—what you call a deck-plate girder,—

Q. Without openings for water?

A. No opening. [233]

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JOHN OIEN,

recalled for further direct examination, by Mr. Maury:

I have a cross section that I made to the north of Brophy's. This is the first cross section to the north of Brophy's, coming towards town.

Mr. McCARTHY: We join in the offer. It is one of our exhibits in advance, that is all. (Marked plaintiff's exhibit P-6).

That cross section shows the high-water line, 1929. It doesn't show for 1921 or anything about that. It shows a bridge; the bridge is about 140

(Testimony of John Oien.)

feet long. That bridge was not washed out when I saw it soon after June 7, 1929. I haven't got it figured out the number of square feet of aperture under the bridge itself, but my lines are correctly drawn so that it could be scaled. It was 20.5 at the deepest point in the channel June 7, 1929,—on this cross section; it was just one point. From there it slopes right up on each side. I would say there was a deep part or channel of approximately 60 or 65 feet there; the width of the water was approximately 2825 feet,—somewhere around there, I can't say exactly. In the deep part of the channel at high water, of course, the water would be moving rapidly, and moving more slowly as it got to the edges.

Q. And would there be an appreciable change in the velocity of the current just as it left the ordinary high-water channel?

A. I believe so.

Q. And that is what causes in nature a sediment or embankment right close to a stream, isn't it?

A. Yes.

Q. And that is why the Mississippi, or any other great river, elevates itself above the sides?

Mr. McCARTHY: Objected to; we don't want to "try" the Mississippi River.

Mr. MAURY: I spoke of all streams. [234]

The COURT: He cited that as a very well known example, I suppose. Proceed.

(Testimony of John Oien.)

Q. Is that the reason, Mr. Oien?

A. I believe so; yes, sir. That is the cause of the change of the velocity of the water right at the edge of the channel.

Going north towards town, I have a cross section at Mr. Burke's place two and a half miles south of Wibaux. The legend on this and in fact, on all of these is correct as far as it goes,—as to what it is; and these exhibits may be examined by one with the legend and may understand, of course, that that is correct. I made it myself.

Mr. McCARTHY: We offer in evidence this cross section at Burke's.

Mr. MAURY: We join in the offer.

The COURT: It may be received in evidence.

(Cross section marked plaintiff's exhibit P-7)

The water at Burke's was about 420 feet wide on June 7, 1929.

Q. How deep was it at the deepest point?

Mr. McCARTHY: I might say, Mr. Maury, I think you asked Mr. Oien yesterday to bring a statement of the various widths and depths.

Mr. MAURY: Surely; have you got that there?

Mr. McCARTHY: We have got it. We might as well have it marked and put in evidence now.

A. 19.4 feet.

I can tell you approximately how high the ground level was at Burke's house; the elevation was about 2673.8.



(Testimony of John Oien.)

These figures on this paper which you are showing me were made under my direction and checked by me.

Mr. MAURY: And we are going to have it identified as soon as the witness reads it and explains what it is.

Q. Mr. Oien, read it to the—— [235]

A. It is the distance from one high-water line to another high-water line, across the valley and the depth of the stream at the deepest point. "Section 1 Brophy's Ranch, 3 miles south of Wibaux"

Q. I thought that was 6.

A. That is wrong; it should be 5 miles. "The width 2795 feet; maximum depth 16.7."

Mr. McCARTHY: By 16.7 you mean 16 feet and seven-tenths of a foot.

A. "Section 3, 4½ miles south of Wibaux, width 2825 feet, maximum depth 20.5 feet; section 4, 3 miles south of Wibaux, width 1790 feet, maximum depth 19.8 feet; section 5, 2 miles south of Wibaux, 2195 feet width, maximum depth 17.1 feet; section 5A, 1½ miles south of Wibaux, width 2402 feet, maximum depth 14.9 feet; section 8, 1450 feet south of Wibaux, width 1850 feet, maximum depth 16.6 feet; section 15, 1376 feet south of main line——"

Q. That is the main railroad line?

A. Yes, sir.

Mr. McCARTHY: That is the embankment shown on the relief map?

A. That is the center of the track.

(Testimony of John Oien.)

A. "Width 2410 feet, maximum depth 18.6 feet; section 18, Massey's Ranch, width 600 feet, maximum depth 14.3 feet; section 11, First Avenue South, width 2650 feet, maximum depth 23.0 feet; section 12, 700 feet north of main line, width 1420 feet, maximum depth 15.5 feet; section 14, 3400 feet north of main line, width 1240 feet, maximum depth 17.3 feet."

Mr. McCARTHY: I would suggest Mr. Oien, while you think of it there, that you take your pencil and write in after "M. L." "Main Line", so we will know what it is. You might put the word "Feet" at the first one there, opposite the 16.7.

I haven't a cross section north of the main line here with me this morning; it is in Billings, I presume—I couldn't say for sure. I don't remember whether that has been introduced in evidence before. I have notes on that cross section. As to the width of the channel [236] on the first cross section north of the track that I took, I have not my notes here in the courthouse.

Mr. MAURY: It (the typewritten sheet) is marked "Plaintiff's exhibit P-8."

Mr. McCARTHY: Has that been offered? Exhibit P-8 is offered in evidence.

The COURT: It may be received in evidence—P-8.

I haven't that cross section here.

Those measurements of depth of water were taken from bed of the stream. The approximate difference

(Testimony of John Oien.)

in elevation of the high-water marks north of the railroad and the high-water marks south of the railroad track for June 7, 1929, was 5 feet. I can refresh my memory from a paper book which you are showing me, page 543, (Transcript on Appeal, No. 2438, Bailey, et al., and other cases, vs. Northern Pacific Ry. Co.). The width of the channel of the stream at the closest measurement that I made north of the bridge, at that particular point, was approximately 170 feet.

Cross Examination:

(By Mr. McCarthy).

My attention has been directed on direct examination, to the bridge just in the vicinity of the Brophy ranch. The bridge is about half a mile north and a little east from the Brophy house. Directly south of the bridge there is, in the way of a natural formation, a big hill, there is a bluff in there, and the Beaver Creek coming down from the south runs around the edge of that bluff; it makes a big sweep or curve there.

Q. Now, Mr. Oien, if the water of Beaver Creek got out of the banks on June 7, 1929, and was sweeping across country—got out of the banks south of the Brophy house and south of this bluff that you speak of, and sweeping across country, would the main current of the water curve around and follow the outline of the bluff and go under this bridge, or would the bluff act as a [237] shelter and break-water for the bridge?



(Testimony of John Oien.)

A. I would say it would act as a break-water and the main current would be thrown to the west.

Redirect Examination:

(By Mr. Maury).

Q. Whereabouts, or opposite what point on the profile showing the bridge, would that bluff be?

A. East end of the bridge is the bluff. I don't remember how far that bluff extends upstream. I should say that the stream hugs the bluff for a distance of two or three hundred feet, I wouldn't be positive about it. The stream strikes the bluff at an angle; it comes on the southwest and not so very far above the bridge—two or three hundred feet, as near as I can remember. Away out to the west, as to the depth of the water at any point to the west outside of the main channel or outside of the bridge, we will put it, will state that in here (indicating) is about 6 feet or a little better; that would be 200 feet west of the bridge, and from there, it gradually grew less until it was nothing to a thousand feet. That bridge is made of wood and was when I saw it in July, 1929.

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R. A. LYMAN,

recalled for further direct examination, by Mr. Maury:

Q. Mr. Lyman, how high would water have to be at the old bridge to be backed up and go over

(Testimony of R. A. Lyman.)

Second Avenue South in the region of the water tower?

A. You would mean the elevation of that country at the water tower as compared with the bridge?

Q. Yes.

A. About 13.9 feet. That is using Mr. Oien's starting point. As to how high the water would have to be at the bridge to cross over the track now between the elevators and near the county road crossing, will state that 13.3 feet is the top of rail above the point under the bridge; 13.3 feet higher than—top of rail—where the spur crosses First Avenue South. [238] In regard to difference in fall of creek from the railroad bridge to the county bridge, there is a fall of  $2\frac{1}{2}$  feet in a distance of 850 feet measured along the meanders of the stream; that would be a fall at the rate of approximately 15 feet per mile. From the county bridge around to the stream right south of the green house has a fall of 4.2 feet in a distance of 1750 feet, or approximately 13 feet per mile. From that point to opposite Massey's has a fall of 2.6 feet in 4,000 feet, or about  $3\frac{1}{2}$  feet to the mile. The effect of increase in fall on water in a running stream will increase the speed, other things being equal.

Q. What effect would an increase in the fall of the stream from Mattie Miller's towards the county bridge have in deflecting water in the direction of the stream and from the bank?

(Testimony of R. A. Lyman.)

A. I wouldn't hardly use the word "deflecting"; it would enable the water to flow more freely; you might perhaps use the word "evacuating" the water there.

The highest water mark that I was shown at Lentz's, 800 feet to the north of the fill, before the 1929 flood, was for the 1921 flood and it was 8.2 feet above the bottom of the channel under the bridge. The correspondence that I would draw as an engineer, between that water mark at Lentz's and water going over the elevator track or going around over Second Avenue and down the stream, explaining,—will state that the water never having been over that stage at Lentz's and considerable testimony at different times showing it having been through the swale and over the elevator tracks would indicate that several times at least, there had been a back-up of water at the bridge.

Q. Would that indicate to you as an engineer, that whenever there had been a back-up around through the swale or over the elevator tracks, if that testimony was correct, that there was obliged to have been a back-up?

A. Absolutely.

Q. By the fill, because of this difference in the height at [239] Lentz's?

A. Yes, sir.

Mr. McCARTHY: I would suggest that it is practically cross-examination of this witness. Of course, I understand he may have considerable lati-



(Testimony of R. A. Lyman.)

tude in putting questions to an expert witness. But I think a witness should be permitted to say something more than "Yes" or "No". Object as an improper form of question.

Mr. MAURY: I will modify it.

The COURT: Yes; it is leading of course.

Q. If it has been correctly testified to here by the witnesses who spoke of the water going over the railroad track by the elevators, and at times, going around by the water tower down the swale, and if the high-water marks that you have given at Lentz's are correct, then what cause would you assign for that difference?

Mr. McCARTHY: Objected to, if the court please, being a hypothetical question not based on all of their evidence.

The COURT: It is rather difficult for the court to say whether it is sufficiently informative or complete. A hypothetical question—you can develop that on cross-examination very readily.

Mr. McCARTHY: My point is this: It ignores the fact of testimony of Mr. Sherman that when he went across the street in the morning, water was flowing from the south to the north. My position is, it is a trick question, in that it takes in part of the testimony and not other parts.

Mr. MAURY: This is as to previous water marks. It doesn't come down to June 7, 1929.

(Question repeated), adding: "Previous to 1929"?

(Testimony of R. A. Lyman.)

Mr. McCARTHY: It is a trick question.

The COURT: Supply those times.

Mr. MAURY: I have added to the question: "Previous to 1929".

The COURT: All right; answer the question.

[240]

A. Well, conditions would indicate there must have been some damming up or stoppage of the water at the railroad bridge.

I have seen the wire screen exhibit before; I saw a very similar screen on Lentz's house. Explaining to the jury those marks, apparently, of rust (this is the top with the brass brad in it), I heard Mr. Lentz's testimony and I thought he explained it correctly; it would be my idea that he did; that water at some time during the flood stood at this bottom—if this was the bottom—for some little time. There is always accumulated silt or dirt that will accumulate at the top line of the flood. If he is correct that every time a chunk of the embankment would go out, it would rise suddenly to this point and the same thing would happen again. There are seven of those well-defined lines that I can see on the exhibit. I didn't use these as high-water marks and I don't remember whether this was a half-screen or a whole screen, but the top mark on the whole screen did coincide with the junction of the sashes in the window which he gave me as the high-water mark and checked perfectly with the different high-water marks inside his house.

(Testimony of R. A. Lyman.)

We are all familiar with the compression of air at every gas station. Water is incompressible, for all practical purposes. There could be no compression of water on the surface of the earth.

According to my computation, the water at the bridge at high-water on June 7, 1929, was going probably right at 27 feet per second; that is about 18 miles per hour.

Q. One and a half foot a second is a mile an hour?

Mr. McCARTHY: Approximately.

Mr. MAURY: Approximately, by any calculation.

According to my calculation, the water in the viaduct at the peak, on that day, was going about 18 feet per second. The speed would vary with the peak; as the peak rose or fell, the speed would vary, absolutely. [241]

I said yesterday that my estimate of the water passing Massey's was 16,000 or approximately 16,000 cubic feet a second. I studied carefully, or studied the amount of water around the town in the 1921 flood and its elevations.

Q. What bridge space, or what length of bridge in your opinion, after calculations, would have carried 16,000 cubic feet of water without permitting it to rise to any greater elevation near the Wagner property than the flood of 1921?

A. A bridge identical with the bridge existing in 1929, except for an added width identical with



(Testimony of R. A. Lyman.)

other conditions, 116 feet long would carry 16,000 cubic feet under the same stage of water as existed in 1921,—116 feet of clear opening. That is taking into account also that the viaduct opening remained the same through from 1921 to the flood of 1929.

The elevation of the ground on which Massey's horses stood as pointed out to me by Massey and as pointed out here in court by Massey, as compared to a point in the stream opposite to that point of the horses, was approximately 12 feet higher than the bottom of the creek at Massey's.

In nature, a tributary stream will always enter a main stream with the acute angle upstream. I think it might also be interpreted, that would be true,—that the tributary stream is always deflected downstream. The idea and statement which I have just made could in a way, be illustrated by a diagram which I see (a diagram cut from a page in a book and shown to the witness by counsel). That correctly shows my idea that I intended to convey—tributary streams are always deflected downstream as they enter the main stream. I don't know what that is intended to portray, but that does illustrate it.

Q. Draw an arrow pointing downstream.

Mr. MAURY: We offer in evidence this illustration and we will paste something over the legend on the back. [242]

(Testimony of R. A. Lyman.)

Mr. McCARTHY: I have no objection. If anybody can make anything out of that, they are welcome to it.

Mr. MAURY: It was said that this tributary went upstream to make that width there——

You can see, gentlemen of the jury, that the small angle on the junction of streams, is always upstream.

The legend will be covered up on the back.

(Diagram marked plaintiff's exhibit P-9).

The COURT: Very well.

If a lake is created by an obstruction, water rises by reason of a fill or makes a lake, and if there is a hole in the obstruction, there is a general movement of all of the water down the lake. I suppose it could be compared to a large crowd trying to get through a small gate to a baseball game.

You asked me yesterday the "purpose of riprapping": I don't think "abutment" was mentioned.

Q. Under what circumstances would an abutment or bank near a bridge be riprapped?

Mr. McCARTHY: Objected to as repetition.

Mr. MAURY: I am not certain whether I did or not.

The COURT: I think so; I think that was all testified to.

Cross Examination:

(By Mr. McCarthy).

I recognize defendant's exhibit D-10 as substantially a map of eastern Montana, with particular

(Testimony of R. A. Lyman.)

reference to the Wibaux-Beach-Carlyle-Ollie territory involved in this case; it is approximately correct; I don't claim it may be exact, but I think it at least illustrates the relationship of the country in question in relation to Billings and other points.

Mr. McCARTHY: Defendant's D-10 is offered in evidence.

Mr. MAURY: No objection.

The COURT: It may be received. [243]

I recognize defendant's exhibit Y-13 as a map showing the watershed of Beaver Creek south of the Northern Pacific Main Line at Wibaux, Montana, and approximately the location of various ranchers or farmers in the valley; I don't know about these residences here. From what I have heard described here, I would suppose that these people live at about these places.

Mr. McCARTHY: Defendant's Y-13 is offered in evidence.

Mr. MAURY: No objection.

Mr. Oien and I made a number of checks as to elevations at various points in the town of Wibaux and south of the town, and I was referring to a memorandum this morning when I was testifying, that I have checked. All the elevations or at least a great many of the elevations that are important in this case are set out on that sheet; those that I didn't check, I accepted, knowing Mr. Oien's work; I didn't physically check them, I accepted them.

Q. Didn't you and Mr. Oien go down and check them over?



(Testimony of R. A. Lyman.)

A. Quite a few of those I didn't physically check I accepted as correct.

Mr. MAURY: I suggest they be read now.

Mr. McCARTHY: With all due respect to the jurymen, I don't see how they can remember all these.

Q. Defendant's D-11 is shown the witness. Does that correctly set forth the elevations at the points described on the exhibit?

A. I wouldn't doubt it.

Mr. McCARTHY: We offer D-11.

Mr. MAURY: No objection.

The COURT: It may be received.

Q. Read it off. Those are set forth in sea-level datum Mr. Lyman?

A. Yes, sir.

Mr. MAURY: Can you translate them with reference to the point that you agreed on, under the bridge?

A. Yes.

Q. Let us read all of these first in sea-level datum and make the comparison there. [244]

A "STATEMENT OF VARIOUS ELEVATIONS  
AT WIBAUX—NORTHERN PACIFIC

DATUM, Group No. 1:

Elevation of bed of stream under Beaver

Creek bridge ..... 2620.0

Elevation of Wibaux Street (Main St.) at

Orgain Avenue ..... 2635.4

(Testimony of R. A. Lyman.)

Elevation of Wibaux Street (Main St.) at Second Ave., South.....	2632.8
Elevation of nominal low water flow line Beaver Creek at intersection of Wibaux Street (Main Street).....	2626.7
Elevation of high water Mattie Miller's Hotel, June 7, 1929.....	2640.6
Elevation of high water Congregational Church about 300 feet north of track, June 7, 1929.....	2634.0
Elevation of sidewalk on street in front of Congregational Church .....	2630.1
Elevation top of elevator spur track at in- tersection of First Avenue South.....	2633.0
Elevation of ground line intersection of 'E' Street and Second Avenue South.....	2633.2
Elevation top of river bank in bend of Creek at intersection of 'E' Street.....	2633.9
Elevation of nominal low water in Beaver Creek at intersection of 'E' Street.....	2626.7''

WITNESS: You have made some subtractions here. Do you care for those?

Q. Yes, put it all in.

A. They have taken the difference between the last two elevations I read, the difference being 7.2.

"Elevation of Wibaux Street (Main Street) at 2d Ave., So.....	2632.8
Elevation of nominal low water in Beaver Creek at intersection of Wibaux Street (Main Street) .....	2626.7''

(Testimony of R. A. Lyman.)

The difference between those two being 6.1.

“Elevation of ground line at Massey’s  
house ..... 2646.7

Elevation of nominal low water Beaver  
Creek at Massey’s cow shed..... 2632.2

[245]

Difference in elevation of those 14.5.

Group No. 2: Elevation of high water at  
door step Mattie Miller house, June 17,  
1921 ..... 2634.0

Elevation of floor O’Keefe house, June 7,  
1929 ..... 2640.2

Elevation of high water O’Keefe house,  
June 7, 1929, about..... 2640.1

Elevation floor of the Youll house, Davis  
Addition ..... 2642.7

# STATEMENT OF VARIOUS ELEVATIONS SHOWING GROUND LINE AND HIGH WATER IN THE VICINITY OF MASSEY HOUSE ABOUT 3000 FEET SOUTH OF WIBAUX:

Elevation of floor at Massey house..... 2648.4

Elevation top of bank in bend about 300  
feet southeasterly from Massey house..... 2644.9

Elevation of low ground between Massey  
house and county road to the east..... 2644.5

Elevation of low ground about half way be-  
tween Massey house and county road to  
the east ..... 2644.1



(Testimony of R. A. Lyman.)

Elevation top of ground where horses stood about 500 feet northwesterly from Massey house .....	2641.5
Elevation top of door cap in cow shed about 200 feet southwesterly from Massey house .....	2645.8
Elevation of high water June 7, 1929, about 200 feet west of Massey house.....	2643.5
Elevation bottom of creek about 180 feet southeasterly from Massey house.....	2629.3''

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There has been received in evidence here what I would call a relief map of the town of Wibaux. Explaining particularly what a profile map is, it is a map showing an elevation along one line. Reference has been made here to contour maps, a contour is a line connecting points of equal elevation and a contour map is a map showing those lines. It is my understanding that the surveying department of the Northern Pacific Railway sent out around Wibaux there, made contour maps and then, from the contour maps this [246] relief map was made, I would suppose. I can find on the relief map here the outlines of the contours when I look for them. I haven't attempted to check this map over thoroughly.

Q. But you have looked it over to satisfy yourself that it is as correct a presentation of a relief map for what is attempted to be shown here as

(Testimony of R. A. Lyman.)

probably what is humanly possible to do, and on that scale?

A. It is a very fine map and as good as necessary if all you wanted it for is general purposes. The scale is one inch equals fifty feet—one inch on this map equals fifty feet. That is true in both horizontal and vertical directions; so, when you go one inch on the map, you go fifty feet. For that reason, I don't believe the map should be used when you get down to fine details. But there is no question in my mind but that there has been an honest attempt, I presume, to portray the situation on this model as far as it is humanly possible to do. I believe I did make several criticisms; I still think I am right, perhaps, they weren't intentional. The criticisms I made were of a couple feet I believe, and that is a small fraction of an inch. One criticism I made was it didn't portray the old dam below the bridge; it didn't look that way to me. This (indicating) across the relief map here is to portray a pipe going across that has been protected with straw, manure and dirt. There is a water pipe running across Beaver Creek at Wibaux—there is something there. I never paid much attention, closely, whether the people there have packed it in with straw and manure and covered it with dirt; to me, it didn't show as prominently on the ground as it does on that relief map; it doesn't show as prominently as there.

Q. That city dam is located where with reference to the county bridge?

(Testimony of R. A. Lyman.)

A. What do you mean?

Q. I mean the dirt and straw and manure all covering the pipe as shown here.

A. That would be three or four hundred feet south of the county bridge. [247]

When I worked for the Des Moines Street Railway Company, I didn't design or construct any railway bridges,—I don't think so; I wouldn't say that I didn't at that. This railroad over in Cuba that I worked on was, I believe, 150 kilometers long, which would be about 100 miles. As to whether I designed any railroad bridges while I was on that railroad, it depends a little on what you mean by "design". I never designed the steel work. I decided on the openings for bridges and that sort of thing. I have heard in these cases, that the bridge in question which was in place at Wibaux in 1929 was put in under the supervision of W. L. Darling.

Q. And from what you as an engineer, know of the reputation of W. L. Darling, you would say Mr. Lyman, that the Northern Pacific secured as good an engineer as it was possible to do at that time?

A. Probably Mr. Darling had a very high reputation as a railroad engineer, that is all I could say. I am familiar with his reputation.

Q. Now, Mr. Lyman, in figuring the area under the railroad bridge you figured the space contained in the rectangle that is formed by the ground, the top of the bridge and the two piers, did you not?



(Testimony of R. A. Lyman.)

A. Figuring it, in what computations? I spoke of figuring the area of the railroad bridge and I said it would be plus that area of the two triangles.

Q. And that you gave an area of what,—1320 square feet?

Mr. HALL: He didn't give the triangles.

Q. Do you accept 1320 as the area?

A. I don't remember to what height you were giving it.

Mr. HALL: 920 is what he gave for the county bridge.

Mr. COLTON: 810.

Q. Give us the area of the water openings under the railroad bridge formed by the rectangle, plus the space formed by the two triangle openings at each side?

A. To what height—to the [248] bottom of the girder?

Q. Yes; you have heard that figure given before by other engineers as 1320. Do you agree with the figures Mr. Lyman?

A. No; I can't see where they can possibly get that much. 1190 is the best I can get.

The way I figure cubic feet of water per second, is the area of the cross section of the water in square feet, times the velocity in feet per second.

Q. If you had 18 miles an hour in velocity going through the bridge at Wibaux, how many feet would that be per second?

A. Filling up the girder——

Q. Going in your opinion—filling up the girder—27 feet per second that you used?

(Testimony of R. A. Lyman.)

A. I didn't mention filling the girder. Taking the area of the bridge 1100-odd, as I figured, and multiplying that by 27, the result is 29,270.

Q. Now, that didn't include the water that went out through the viaduct?

A. That isn't the water that went through the bridge; that is the speed after it made the drop.

Q. Didn't you tell us the way you calculated you multiply the area by velocity in feet per second?

A. Yes.

Q. When you multiply that, you get 29,000——

A. I did, but that isn't the velocity.

In addition to the water that went through the bridge over Beaver Creek on the day of the flood, I am satisfied that a tremendous volume of water went from the south of town to the north of town under the so-called viaduct; that was additional water to what went through the bridge.

Q. You told us yesterday, did you not, Mr. Lyman, that you computed the cubic feet of water per second that flowed through Wibaux in 1929, the day of the flood, was 15,000-plus, and you made it 16,000 in round numbers?

A. I estimated that as the flow past Massey's, yes, sir. [249]

The velocity that I used at Massey's in making that computation, the average velocity was 4.19 I believe—yes, 4.19 feet per second. That would be approximately three miles per hour. Whether it would be 2.8 figured down closely, I never tried to

(Testimony of R. A. Lyman.)

figure it; around three. I was here when Mr. Massey was on the stand.

Q. Did you hear his testimony that that water was flowing there all day at a speed considerably greater than a man would ordinarily walk?

A. I think so. I don't know that I heard Massey say that. He said he thought objects were moving faster than that.

Q. When a man speaks about how fast a man ordinarily walks, how fast is that?

Mr. MAURY: We object. That is not for the counsel or the witness.

Q. When you heard Mr. Massey testify with reference to how fast a man would walk, what did that testimony indicate to you in, say miles per hour?

Mr. MAURY: That is objected to; it means nothing.

The COURT: What one witness would mean by how fast a man would walk, it might not be the same.

In arriving at my computations I am absolutely ignoring Mr. Massey's testimony.

The width of the high water at the cross section at Massey's was 600 feet, stream width. I said that the elevation of the ground on which the horses stood, above the creek bottom, was 12 feet. Assuming that Mr. Massey's testimony is correct, that the water came up on those horses about 2 feet, 1½ to 2 feet, then there was a depth of 13½ or 14 feet, something like that.



(Testimony of R. A. Lyman.)

Q. Now, Mr. Lyman, directing your attention to the bank on the south side of Wibaux between the city water tank and say, the green house; on the elevations which you have given us, or from your notes, what was the greatest height of that bank above the creek bottom bed, right there on the edge of the bank? [250]

A. I don't know anything about the greatest; I was looking for the lowest; I got as the lowest about 7.2.

Q. Wasn't 7.2 your maximum?

A. Well, it depends on where you go. If you go beyond the water tank, it would be. No,—7.2 was what I tried for the dip—the entrance to the swale.

Q. If you had water to a depth of 14 feet rushing across that country and nothing but seven feet to stop it, you would expect some of that water to go into the town, wouldn't you?

A. I would expect some of it to go down the swale, yes.

I have testified in several of these flood cases in the District Court of Fallon County. Figuring the discharge at Mr. Massey's place, when I got my cubic-feet-per-second of 15,800, the area I used was 3774 (square feet). In figuring the velocity I used the Chezy and Kutter formula. In applying the Chezy and Kutter formula to ascertain the velocity of the water at the Massey place, it is necessary for me to decide on what slope I will use as one of the factors in using the formula. I used a slope .006. I obtained that from difference in eleva-

(Testimony of R. A. Lyman.)

tion from two points given by Mr. Oien, being a point at or near Mattie Miller's and a point at Massey's. Giving you a little more accurately the points I used: I took the bottom of the creek at Massey's, as he calls it, 2629.3, and the elevation of the bottom of the creek at Mattie Miller's or thereabouts, as 2626.7.

Q. Mr. Lyman, in taking your two points to ascertain the slope, you used a point about where you were computing the velocity, that is of the water, and a point considerably downstream from there, did you not?

A. I understand that Oien's section was a little above mine; I was getting points above and below. The point in the vicinity of the Miller house was considerably downstream. I don't think that I should, instead of taking the point at the Miller house, have gone upstream to a point at Massey's and taken the point there. [251]

Q. If it should appear here that the proper way to compute the velocity and in ascertaining the slope, is to take the point in the vicinity or in the first cross section that you considered it and the point upstream, then your whole computation is wrong?

A. No.

Q. And so far as ascertaining the slope is concerned?

A. No, sir. I took a point below the cross section and a point above, as I understand it; I took

(Testimony of R. A. Lyman.)

the grade of the stream—grade of the bed. Another factor you have to use your judgment on is the coefficient of roughness; I used the coefficient .030. It was as small a coefficient as I felt could possibly be used.

Q. I direct your attention Mr. Lyman, to your testimony given at Baker, Fallon County, Montana, in the case starting the 5th of January, 1934, with particular reference to testimony given by you on the 10th of January, 1934, page 65, lines 26 to 32, inclusive. Will you read that please? (Recess).

Q. Mr. Lyman, having refreshed your recollection by reading over the testimony to which your attention has been directed, didn't you testify previously that you used coefficient .04 or .045?

A. No, I don't think I testified to that; I said I wasn't sure.

Q. Didn't you say (handing transcript to witness) in answer to a question: "I don't remember but I think .04 or .045. Question: Either .04 or .045? Answer: I think so."

A. I testified that, yes.

As you decrease the coefficient of roughness it would not decrease the volume of cubic feet of water per second—the effect of taking .03 as a coefficient of roughness would not be to decrease the amount of water; it would increase it.

Q. So, you are taking a lower factor at this time?

A. I never took .045; I never said I did. But my testimony is as you read it. In getting the point



(Testimony of R. A. Lyman.)

of the slope that I took in the vicinity of the Miller house, as to whether I went straight across the [252] country or followed the stream all the way around, will state that the elevations were absolute; to get the slope I used the meandering distance. By "meandering distance" I mean the distance around that the stream runs ordinarily—the depth of the channel of the stream.

Q. Mr. Lyman, calling your attention to page 36 of your testimony given in the trial of a case in the District Court of Fallon County, Montana, last January (January 10, 1934), particularly to lines 24 to 29 inclusive. I will ask you to read that.

A. I have read it.

Q. Did you not testify at the trial to which your attention has been directed: "Disregarding any back-water, it was going,"—(referring to Massey's place; "it", the water), "it was going between eight and nine feet per second. Question: About how many miles would that be, about? Answer: Five to six miles per hour." Did you testify that?

A. That is my testimony, but it refers to an entirely different thing. If you go back far enough, it refers to 30,000 cubic feet per second. That is my testimony as you read it—that portion of it. Taking my area 3774 and multiplying that by 9, gives us the answer, 33,965. Using those figures, that would be 33,000-odd cubic feet of water per second.

Q. I call your attention to the record (printed Transcript on Appeal) in the case of Bailey, Stair,

(Testimony of R. A. Lyman.)

et al., and other cases, vs. the Northern Pacific Railway Company (the September and October, 1933, cases), page 600, folios 10 to 15, and I will ask you to read that.

A. I read it.

Q. Is it not a fact that in the trial of the case of Bailey, et al. vs. Northern Pacific, you were asked this question: "How fast was that water going after it left Massey's, Mr. Lyman? Answer: Well, I think it was going fully twice that fast at Massey's. I believe you misunderstood my testimony. I don't [253] believe I ever testified it was only going four miles an hour at Massey's. \* \* \* I imagine it was going nearly twice that fast at Massey's."

Mr. MAURY: You read the word "fully" in the text you served on us.

Q. "I think it was going fully twice that fast at Massey's. I believe you misunderstood my testimony. I don't believe I ever testified it was only going four miles an hour at Massey's. \* \* \* I imagine it was going nearly twice that fast at Massey's." That is the way it reads here. By "nearly twice as fast as four an hour," that would be nearly eight miles an hour wouldn't it?

A. Yes.

Eight miles an hour is approximately 12 feet per second. Multiplying my area of 3774 by 12, it gives us the answer, 45,288.

Yesterday, in answering questions propounded to me by counsel for the plaintiff, I referred to

(Testimony of R. A. Lyman.)

certain formulas, Dickens', Myer's, Talbot's, and so forth; I recognize Webb as an authority on engineering; it is a good text-book.

My attention having been called to a volume Webb on Railroad Construction, with particular reference to pages 252 and 249. On page 252 is the Myer's formula, and Talbot's, set forth that I referred to yesterday; I didn't give the results yesterday, I mentioned that I had at other times figured them up from that.

Q. After Webb sets out Myer's formula and Talbot's formula, will you read into the record what Professor Webb himself said?

Mr. MAURY: First, read the formulas; read both formulas.

Q. Read the whole thing then.

The COURT: What are you going to gain by that?

Mr. MAURY: The bridge is insufficient, tested by either one of those formulas. Counsel has offered them; let him put them both in. When you actually take Myer's [254] formula and apply it to this bridge, you will find the bridge is insufficient——

The COURT: I don't want to hear argument on that now. My understanding of Mr. Lyman's testimony was that he told about these various formulas and he had figured them out and all, and that his judgment was that the opening was insufficient as to the formulas.

Mr. MAURY: Everyone except Myer's. We can show it is insufficient on Myer's formula.



(Testimony of R. A. Lyman.)

Mr. McCARTHY: What I am interested in is to have him read the qualifying remarks of Mr. Talbot himself.

Mr. MAURY: Let him put in the thing it qualifies.

The COURT: What does it qualify?

Mr. McCARTHY: Talbot's—

The COURT: Q. Did you refer to Talbot's formula yesterday?

A. I did. I didn't give any results yesterday. I said one showed the bridge as sufficient,—possibly one, and all the others showed it insufficient.

Q. Tell us what the Talbot formula was and then his words of caution.

Mr. MAURY: It was the Myer's formula he spoke of showing that the bridge was insufficient.

The COURT: Go ahead; let us "get somewhere."

A. (reading): "Area of waterway in square feet equals C times (4th root) (drainage area in acres); 'for steep and rocky ground C varies from  $\frac{2}{3}$ ds to 1. For rolling agricultural country subject to floods at times of melting snow, and with the length of the valley three or four times its width, C is about  $\frac{1}{3}$ ; and if the stream is longer in proportion to the area, decrease C. In districts not affected by accumulated snow, and where the length of the valley is several times the width,  $\frac{1}{5}$  or  $\frac{1}{6}$ , or even less, may be used. C should be increased for steep side- [255] slopes, especially if the upper part of the valley has much greater fall than the channel at the culvert' " \*

(Testimony of R. A. Lyman.)

WITNESS: It says "culvert", not "bridge."

" 'As an illustration, if the drainage area is 100 acres, the area of waterway should be C X 31.6. The area should then vary from 5 to 31 sq. feet, according to the character of the country. Like the previous estimate, the result depends upon the choice of a coefficient and disregards local variations in rainfall, except as they may be arbitrarily allowed for in choosing the coefficient.' " "Value of empirical formulae. The fact that these formulae, as well as many others of similar nature that have been suggested, depend so largely upon the choice of the coefficient shows that they are valuable 'more as a guide to the judgment than as a working rule', as Professor Talbot explicitly declares in commenting on his own formula. In short, they are chiefly valuable in indicating a probable maximum and minimum between which the true result probably lies."

Myer's formula and Talbot's formula as set forth in Webb, are contained in a chapter, the heading of which is on page 249; the heading of that chapter is "Culverts and Minor Bridges." My attention having been called to page 196 of Webb, we find that bridges, trestle bridges, and so forth, are set forth in an entirely separate chapter.

Q. So that Myer's formula and Talbot's formula is not given in the chapter on bridges?

A. Yes, sir.

Q. He gives it only on culverts and minor bridges?

A. They are only proper for those small two—

(Testimony of R. A. Lyman.)

Q. Mr. Lyman, have you been in touch with, or seen, the report of the Army engineers, who made a study of the Beaver Creek situation?

Mr. MAURY: We must object as not proper cross-examination, and what the Army engineers have said is only relevant when the Army engineer's deposition is taken; it is entirely a [256] matter of hearsay.

Mr. McCARTHY: We have the same right, in my opinion, to examine this witness on a United States Government report as we have to examine him on a text book,—to see whether or not he agrees.

Mr. MAURY: He must first be asked whether that is authentic—whether it is any authority to him, or whether he believes it to be an authority. It is pure hearsay.

Mr. McCARTHY: I will withdraw the question for a minute. Defendant's D-12 being a duly certified document of the United States Government, is offered in evidence.

Mr. MAURY: No certificate is here; we object to it.

Mr. McCARTHY: The certificate is there.

Mr. MAURY: No certificate from any person who is qualified to certify testimony to this Court. It is objected to as hearsay matter *inter alios*; matter not shown to be relevant or competent in any way in this Court; not shown to be made by any person that is before the Court for the purpose of examination. It is propaganda. It might well be



(Testimony of R. A. Lyman.)

propaganda, just as well, of the Northern Pacific Railway Company, and in fact, if one were familiar with the trials that have gone before, one would see a correspondence between certain testimony and what appears in this thing, so great that it would show that there were some of the Northern Pacific engineers that have testified previously in these cases, must have given some of the data to the persons who made this report; it couldn't be otherwise. Furthermore, the report goes outside entirely, of the realm of the case, into regions where there is no similarity of conditions at all. Instead of a slight dissimilarity of the movement of the creek of 100 feet to the east, this report goes to Marmarth, in one of the Dakotas,—it goes around by Medora I think; it goes—it [257] touches at Wibaux. It is purely a matter of hearsay and not properly identified in any way for reception in this Court—for instance, “Plans for Flood Protection at Marmarth, North Dakota” appears on it. Who made it? Nobody knows,—no name of any Army engineer. It would be an invasion of the Judiciary by the Executive—if this comes from the Executive branch of the Government, and it possibly does—it means nothing to anybody.

The COURT: Who made the report? Was it a board of the Army engineers?

Mr. McCARTHY: It came from the United States District Engineer's office,—Report to the Secretary of War,—duly certified; a study of flood-

(Testimony of R. A. Lyman.)

control conditions, with particular reference to the Town of Wibaux; we have only taken that part of Wibaux.

The COURT: Has any engineer that had anything to do with compiling this report——

Q. Mr. Lyman, you have had a copy of this——

A. I have had a copy of a report and a map.

Q. And you told one of the Northern Pacific engineers of its existence?

A. Mr. Beach?

Q. Yes.

A. I don't remember whether I told him or not; I remember a conversation where it was mentioned, yes.

Mr. McCARTHY: Of course, Mr. Beach thanked you at the time, and I thank you now.

The COURT: I will have to look this over and consider it. Go to something else; I am not going to take the time now to pass on it.

(See page 212 [page 333 of this printed record]).

I can give you the ground elevation at Wibaux or Main Street at Orgain Avenue; it is 2635.4, sea-level elevation. The elevation of the surface of the ground or the sidewalk in front of the Congregational Church—Community Church—the church that is [258] located on Wibaux Street, north of the railroad embankment, is 2630.1. The difference in those two elevations is 5.3 feet. The difference in the elevation of the creek at the point here at the turn and the point here opposite the church (indicating on map), it would be approximate.

(Testimony of R. A. Lyman.)

Q. Can you give it to us approximately?

A. Would the creek under the bridge suffice for both?

Q. No, I want to get the elevation of whatever point you have it on up here in the creek south of the railroad bridge and north of the railroad bridge?

A. I haven't any elevation between the railroad bridge and the county bridge. I have both of those.

Q. What I have in mind is the difference in fall between the elevations at points about half——

A. I can split the difference in the two elevations at the two bridges; I believe it would be a fair elevation for what you want. That would be (this is an approximate figure), I believe the creek in line with Orgain Avenue—would that be what you want? Elevation 2621.3. I haven't got the elevation of the creek at a point directly east of the Community Church. I think it would be fair to say that the difference in elevation would be approximately two feet—somewhere in there; just about I imagine. So that the fall of the creek would be about two feet and the difference in ground elevation from Orgain to the Community Church was 5.3.

Q. So, you would expect water to run down Wibaux Street faster than down the creek, wouldn't you?

A. No; but it didn't run down Wibaux Street—Would I expect it to go faster than down the creek? It would, where difference in elevation, yes. Water would go down where there was a difference of 5.3



(Testimony of R. A. Lyman.)

faster than it would where there was a difference in elevation of approximately 2 feet.

The elevation of the high-water marks at Wibaux and First Avenue South for 1929, was approximately 2640. If you want it more exactly, I can give it. The elevation of the high-water mark [259] at the Mattie Miller house was approximately the same, perhaps two or three inches higher. I can give them both exact, if you want it: the high-water mark at the Mattie Miller place was 2640.6 and the high-water at intersection of Wibaux and First Avenue South was 2640.2, as I have it. I have got the elevation in some of those houses, of the high water of June 1929, at the point near the city water tower, but they weren't very reliable.

Q. What did you get, the nearest elevation of high water in 1929 in the vicinity of the water tank, city water tank, either at the tank or right adjacent to it, or as close as you can come?

A. I have two houses where people gave me high-water, but they admitted they weren't sure of them; but, assuming they were—2641.4. I have no elevation of high water at E Street and First Avenue South.

The valley, generally speaking, to the south of Wibaux widens and narrows—very much so. The effect of taking water out of a wide area where it had overflowed, and forcing it through a narrower portion of the valley is to increase the velocity, other things being equal. In fact, generally speaking, when you increase the velocity or speed of the

(Testimony of R. A. Lyman.)

water, invariably, you can get more water through an opening than you can if the water is coming in slowly; if the water is coming fast, there will be more of it go. If you got it up to a velocity of 18 miles an hour at the railroad bridge in Beaver Creek, I would expect to get a lot more water through without spilling over the sides, at 18 per hour, than if it was only going 4.

Redirect Examination:

(By Mr. Maury).

The carrying power of moving water of objects of a greater specific gravity than water, increases as the sixth power of the velocity, and if water going one mile an hour will move a certain object, water going at ten miles an hour, the same [260] water, it will move an object 1,000,000 times as big.

Q. Mr. Lyman, examine the book—Webb's—and see if the Myer's formula you spoke of yesterday is not the same one I used at the Virginia University forty years ago, and if that is the opening at the bridge for the water, where the water shall be the square root of the acreage of the watershed multiplied by a coefficient varying with the character of the watershed, from one to four?

Mr. McCARTHY: Objected to, because he is obviously asking the witness to do the impossible, namely to take the formula put in a chapter relating

(Testimony of R. A. Lyman.)

to culverts, and have him say that chapter refers to bridges.

Q. It is on page 252, I think, or 256,—right in there somewhere.

The COURT: Well, what would you denominate the bridge in this case, for instance? Would that come under the chapter of bridges or small bridges?

Q. Oh, no, there is no question about that, Mr. Lyman. The bridge over Beaver Creek, you can't class as a culvert or minor bridge, can you?

A. Not now.

The COURT: How was it in 1929?

A. I think you would call it a small bridge. There is no definite line between them. I don't know where you draw your line.

The COURT: Counsel was making a point in that distinction between the chapter on bridges and the chapter on culverts or small bridges. I don't see what you can make out of that question propounded by counsel.

WITNESS: What was the question Mr. Maury?

Q. Myer's formula that you spoke of yesterday, is it not the square root of the acreage in square feet, multiplied by a coefficient varying from one to four, according to the character of the climatic conditions of the watershed,—never less than one and not more than four?

A. That is it. That is Myer's formula. I have calculated before the square root of the acreage here; I don't [261] remember it now.

Mr. MCCARTHY: What coefficient?



(Testimony of R. A. Lyman.)

Mr. MAURY: We will have him use the coefficient first and then let him tell us what the coefficient on the watershed should be, the lowest coefficient being one,—the minimum.

A. If I have made my computation correctly, according to Myer's formula, the area would vary from 1467 to 1868 square feet. In a bridge 65 feet long and for banks 6 feet high, there would exist 390 square feet. That would not in anywise measure up to the lowest, the minimum—the square footage,—the minimum required by Myer's formula.

There are elements in this watershed that would lead me to use a higher coefficient than the minimum; I wouldn't consider this formula at all. In the first place, I don't think it a proper formula for a watershed.

Q. But that was the one you were speaking of that the bridge might comply with?

A. This is the smallest formula by far; it doesn't comply—not to carry water put at over 6 feet in height.

Q. And without backing it up over the ground here (indicating)?

A. It wouldn't get into the main portion of the town at all. But it would, I imagine, back it up a little behind the bridge.

Q. Mr. Lyman, attention was called to certain of your testimony, about you having said, or claimed that you said, that there was 30,000 cubic feet of water passing Massey's. Was that given in answer to a hypothesis of counsel that was submitted to you?

(Testimony of R. A. Lyman.)

Mr. McCARTHY: I submit the record itself shows.

Q. Read the record given at the same time and at the same examination, and from page 405 (Transcript on Appeal, case of J. R. Bailey, et al., and other cases, vs. Northern Pacific Ry. Co.).

A. Do you want me to read it aloud?

Q. Yes. Read it aloud, and commence at line 5. Was that testimony [262] given by you at the same time and same examination where they say that you said there was 30,000 cubic feet going——  
Read it.

A. "Taking my figures and assuming they are correct, and assuming there were 10,000 cubic feet of water per second passing by Mr. Massey's place in 1921, and 30,000 cubic feet of water per second passing by Mr. Massey's in 1929, I can not compute for you what the increased carrying power of the water would be in 1929 as compared to 1921; the velocity would not increase with the cubic feet per second. You can only estimate the carrying power from the velocity; three times the carrying power doesn't mean three times the velocity. Velocity increases with volume, but not in proportion. If we had three times the volume of water coming down through that valley and passing through these narrow places in and out, I would expect, because it would raise higher, that the water at the rate of 30,000 cubic feet per second would flow faster than the volume of water at 10,000 cubic feet per second; it is the depth of water that gives it the

(Testimony of R. A. Lyman.)

velocity." Is that all? I made that statement also in answer to counsel and I think, in the same examination.

As to whether I was asked to give my opinion as to the coefficient I was using in Kutter's or Chezy's formula without referring to my notes, will state that I was asked what coefficient I used and I said I didn't remember.

Q. You stated that to counsel and he pressed you for your best memory?

A. I repeated it, and the testimony shows that.

Q. In one of your answers, you said: "Disregarding back-water at Massey's, it was going between eight and nine feet per second. Question: About how many miles would that be? Answer: Five or six miles per hour." (Transcript, page 36, Jan. 10, 1934). Could you disregard, in your opinion, back-water at Massey's? I mean in actual computation?

A. No, I don't think you should; I think there was undoubtedly a back-water influence there. [263]

Q. And how far has back-water been measured to extend in lakes in Germany and Switzerland?

Mr. McCARTHY: Objected to, if the Court please. We were in India yesterday; let us not take in Europe today,—too remote.

Q. How far is it known by engineers to extend?

A. That depends on the fall of the stream. I think if you refer to one thing quoted in other testimony——

Mr. McCARTHY: The further objection that



(Testimony of R. A. Lyman.)

he is attempting to compare lakes and rivers of India,—a different type.

Mr. MAURY: Water is the same.

The COURT: I can't see what value it would be. There would be no similar conditions that he could refer to.

Q. This universal law as to lakes with water running out of them.

A. If you wish me, I will give you my understanding what is meant by back-water.

The COURT: Explain it briefly; it might throw some light on the subject.

A. In a flowing stream, whenever an obstruction of any nature or damming of the stream causes an increased depth of water immediately above the obstruction, there is an increased depth upstream from the obstruction to a great length, depending on various factors and, in theory, it extends forever—it goes to infinity, but practically of course, it doesn't. But it is a very complicated mathematical formula and one you couldn't apply to Beaver Creek; it would be if fairly straight,—you could get at it. But I am satisfied there is an increased influence at Massey's due to back-water; how much I couldn't say. I can't say whether there was a substantial amount—I don't know.

Q. When you were speaking of any speed of water at Massey's of eight miles per hour, did you have in mind what counsel asked you to assume—that there was 30,000 cubic feet per second?

A. I think that was the basis—that certainly

(Testimony of R. A. Lyman.)

was my impression— [264] that it was referring to a proposed flow of 30,000 cubic feet per second. I never assumed that there was any such flow there; I never believed that there was.

(Recess until 1:30 P. M.)

The COURT: In respect to defendant's proposed exhibit D-12 (No. 566), I will sustain the objection to its introduction. Proceed.

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R. A. LYMAN,

recalled for further redirect examination:

(By Mr. Maury).

I was asked by counsel this morning to multiply the speed of 27 feet per second,—18 miles per hour—by the cross-section area at the bridge. That was absolutely not a fair method of computing the water that was running away there, because at the rate of speed, that 27 feet per second, which is an enormous flow, is only there because of an impounding of water owing to depth of 10 to 13 feet and it applies that speed is only the portion after the drop. As to what makes the speed, it is the impounding of the water, where water is standing at two levels, it imparts a great speed to that portion of the water below; and by the drop itself, the speed is imparted—by the head from which it drops—gravity pulling it down is what gives it the speed. In order to determine the cubic feet per second passing through the bridge, multiply 27 feet per second by

(Testimony of R. A. Lyman.)

the area after it made the drop, not by the total area. There is not any sudden drop in the ground surface from Orgain Avenue to the point near the Community House; it is a fairly gradual drop.

Q. Is there any such drop there as could account for the difference of six or seven feet in the elevations, one side from the other?

A. It would be possible if it wasn't for the fact that I had high-water marks both north of Orgain Avenue and south of the Community Church showing that the level of this impounded water south of the track carried on at least to the old Sutherland garage and probably right to the embankment, and that the [265] drop had already occurred by the time it had reached a point opposite the section house.

Q. What effect as to the water further up the watershed would be narrowing of the banks at Massey's and at Burke's have? Where water from a wide open space comes to a narrow point of a stream, what effect does the narrowing of the banks have upon the water of the stream?

A. It would tend to impound it, other things being equal.

Mr. Oien introduced, or you introduced from Mr. Oien this morning, certain cross-sections, and he was asked for depth of water. I can take this cross-section P-7 and using it, tell how much the water raised by the flood of June 7, 1929. He shows not only the ground-line, but the depth of the low-



(Testimony of R. A. Lyman.)

water or water-level,—what I would call the living water in the bed of the stream; it is simply a matter of subtracting the low-water from the high-water. He has designated on his cross-section here, low water by dotted lines and the bottom of the stream below those dotted lines. That appears on all these cross-sections that you introduced this morning. I can tell from his cross-section what the rise of water was on June 7th at Burke's place, using the Burke cross-section; as a matter of fact, I have it figured. The rise of water June 7th at Burke's place was 16.4 feet, and that is taken from his cross-section that he introduced. As to what the rise of water was at Massey's place on June 7, 1929, he has no cross-section from that but his figures that we have checked on. I think those figures are a matter of evidence; they are on the list of elevations on which Mr. Oien and I agreed. That is here now—D-11; from that, I was able to determine the rise at Massey's as 11.3 feet on June 7, 1929. In consideration by anyone, of D-11 and the figures for elevations set in this column here, 2620 feet should be subtracted from each of these to determine how high the given point is above the [266] point B under the Northern Pacific bridge—2620 should be subtracted, and that is the top figure in the column, so that the next point, 2635.4, is really 15.4 above the bottom of the river under the bridge.

Recross Examination by Mr. McCarthy:

Q. Mr. Lyman, on redirect examination this morning, your attention was called to your testi-

(Testimony of R. A. Lyman.)

mony I had read you on cross-examination, as to the coefficient used by you in connection with Kutter's formula and you said that was your opinion at that time and you were not trying to give it exactly when I asked you about it at the other trial?

A. That is my recollection.

Q. I asked you during cross-examination, did I not——

A. I don't remember.

Q. Now, stop and think Mr. Lyman. Didn't the reference to the Kutter formula come on your cross-examination while the plaintiffs case was being put in?

A. I presume so; I don't recollect. I remained in the courtroom all the time the defendant's case was being put in or a good share of it. I was there when the defendant was putting some of its case in. I never went back on the stand to make any corrections in those figures. I figured the area under the railroad bridge as 1100 and some-odd feet—1190 I think would be the total up to the girders. I never had the opening of the areaway for water under the county bridge, except from your cross-section of First Avenue South, was the only place I ever saw that; I haven't that with me.

Q. That was 920?

A. I think so.

Mr. MAURY: We object. Disputes that arise hereafter are too imposing.

A. It was here and I was using it, if I remember right.

(Testimony of R. A. Lyman.)

Mr. HALL: He testified yesterday——

Mr. MAURY: Refer back to the reporter's notes, because a man's memory from yesterday to today is not so good [267 as calculations and the results of it.

Assuming 920 square feet to be the correct area of the open waterway under the county bridge, and taking my figure of 1190 square feet as the area under the railroad bridge, the railroad company under my figures, had provided an opening that had 270 square feet more than the county had under their bridge.

I referred here this morning to the cubic feet of water per second that passed a given point in 1921. I figured the cubic feet of water per second that passed through Wibaux per second, under the railroad bridge, in 1921; that figure was right at 10,000. So that if 30,000 or more, cubic feet of water per second passed through Wibaux in 1929, the flood of 1929, based on the rate of flow per second, was three times as great as that of 1921.

In the Beaver Valley there, following the creek up the valley, the slope, say in a mile on the average,—the average of the valley floor was about 12 feet per mile; each mile there was a difference in elevation of about 12 feet—each mile measured, disregarding the bends of the creek,—each mile straight line. Figuring the difference in slope for my computations this morning and taking the point I used in the vicinity of the Massey ranch and the point in the



(Testimony of R. A. Lyman.)

stream I used in the vicinity of the Miller house, I used a slope of .006 I think. .006 would be a slope of about 3.2 feet per mile I believe. As to why I used a slope of 3.2 per mile to ascertain as my basis of computation, when I said that generally speaking, the drop in that creek was about 12 feet per mile, will state that I was very explicit in saying that the drop of the valley was 12 feet per mile, measured straight, and I think yesterday, I said that that would probably mean about 6 or thereabouts feet per mile, measured in the creek. If it meant 6 measured in the creek, 6 is approximately twice the value of 3.

Mr. McCARTHY: Well, I think it is self-evident; that's all. [268]

Redirect Examination by Mr. Maury:

The County had left an enormous escapement for water outside of its bridge—for water coming down Beaver Creek; if the measurements I give are correct, they had left an escapement for water outside of the bridge. The correctness of the outline of the road here as portrayed on the relief map, I couldn't really criticize; I don't think it shows as much of a dip as there is, but it is hard to measure it. As to how much the dip is there below the level of the county bridge, I have the figures on that; the bottom of the sag in the county road east of the bridge is 9.7 feet lower than the clearance of the present county bridge. Now, there is some difference between the present county bridge and the one existing there in the flood, I don't know what is the

(Testimony of R. A. Lyman.)

difference. That sag is shown on exhibit Y-4; this (pointing) would represent the county bridge, from there to there.

Q. Indicating an arrow pointing down?

A. Indicated by a dotted line \* indicated here in black ink between points A and B indicates width of the county bridge. The sag starts out by a point indicated in black ink, C, and extends 775 feet probably, to a point indicated by black ink, D. This doesn't give the height of the bridge; I can't quite tell you what its deepest place would be. That is drawn to scale; the scale is one inch equals 50 feet horizontal,—the same both vertical and—These figures indicate about four to five feet, that portion of it,—the sag. The square footage there has been calculated 3230 (2230?). That would be an escapement for the water at the county opening there in addition to the bridge there.

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### OLIVIA WAGNER,

recalled for direct examination, by Mr. Maury:

At my father's store in Wibaux, the first week in June, 1929, I should judge that the height of the sidewalk above the [269] street was from 10 inches to 1 foot. The floor of the store above the sidewalk was about 1 foot. The height of the lowest clothing or shoes or any personal property—his chattels there—was a foot or a little more from the floor.

## NICK WAGNER,

recalled for further cross-examination by Mr. Hall:

Having been handed the complaint in the case of Nick Wagner vs. the Northern Pacific Railway Company, which was filed in Wibaux County, and calling my attention to the affidavit at the back end of it, that is not my signature there. I said, I don't think so. Maybe I testified the other day I signed the complaint and swore to the complaint; I don't think I ever seen that paper.

Q. Look at that right there. This is sworn to before Thomas C. Colton. It says: "Nick Wagner, being duly sworn, says that he is the plaintiff in the foregoing complaint," and it says: "Subscribed and sworn to before me,—Thomas C. Colton." Can you see? Look at that carefully and say in whose handwriting—or whose handwriting is that?

A. It is a good imitation; it is a pretty good imitation, all right.

Mr. HALL: We will call Mr. Colton.

Mr. COLTON: This is Nick Wagner's signature. It was signed before me as Notary Public and sworn to before me.

Q. (speaking to witness) That is your signature right there? (Witness nodding, indicating "Yes".)

Mr. HALL: We have the Dun and Bradstreet man here with another statement signed by him. He is not here right now. So, we can go ahead with our case.

Mr. MAURY: Sure. Just one question:

Q. Nick, you came to Mr. Colton's office and told him to sue the railroad? (No ans.)



(Testimony of Nick Wagner.)

Q. Nick, you came around and gave me a list [270] of your stuff and told me to sue the railroad, didn't you?

A. I did, somebody, yes.

Mr. HALL: We offer this in evidence, the complaint here, so we have it here for comparison.

Mr. MAURY: I think it is deemed in evidence, may it please the Court.

The COURT: It can be introduced with the understanding that a copy will be substituted after the trial. The original is in the Court now.

Mr. McCARTHY: The certified copy is here now.

Mr. MAURY: We agree to that. (Complaint unmarked).

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PLAINTIFF RESTS.

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L. B. BRYSON,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

I live at Ollie, Montana. Ollie is near the headwaters of Beaver Creek. With reference to the Beaver Creek watershed, the town of Ollie is nearly half a mile at the nearest point, from the creek. As to where water from Ollie drains so far as

(Testimony of L. B. Bryson.)

Beaver Creek is concerned, it drains in a north-westerly course towards Wibaux; water adjacent to Ollie nearly all drains into Beaver Creek.

The night of June 6, 1929, and the morning of June 7th, I was at home half a mile south of Ollie, about half a mile, right on the creek bank.

Q. Did you have a storm there that night Mr. Bryson?

Mr. MAURY: We object as too remote—35 miles away—No similarity of conditions has been or can be shown, and there being far better evidence much closer to the scene [271] and in the power of the defendant.

The COURT: Let the jury retire for a few minutes and we will talk about this. (Jury retired) (Argued).

Mr. MAURY: Now, as to all testimony that will be offered showing conditions above Brophy's place, that will be described, we ask to state to the Court now a general exception to all that.

The COURT: You can make your general objection to all that line of testimony above Brophy's place.

Mr. MAURY: That it is too remote and no similarity of conditions of property in town or near the bridge can be shown; or that none will be offered or will be established, and that the Court should exclude everything above Brophy's place and all conditions above that.

The COURT: Objection overruled.

Mr. MAURY: We except.

(Testimony of L. B. Bryson.)

(Witness continuing):

I live about half a mile south of the town of Ollie. Since 1909 I have lived in the vicinity of Ollie, but I have lived on this place that I am living on now since November, 1925. On June 6, 1929, there was a storm at Ollie where I lived; it was the hardest storm—hail and rainstorm—that I ever saw. I am not certain as to the time it started, but I think it was probably a few minutes past 9:00 o'clock when the first storm struck there at my place. I don't believe it lasted more than 45 minutes, that is the heft of the storm. It hailed for a few minutes, then rained hard for a while there, I don't believe more than 45 minutes. There was further rain there that night, there was rain during the night, along through the night, but I can't tell you what time or how much. There is a dam on the land that I live on. This was a dam that was built across Beaver Creek several years before and there had been a flood there before 1929 that [272] washed over the top of the dam and washed away portions of the dam and cut a ditch or small channel around the west end of it. The storm of 1929 completely washed out what was left of the dam in the main channel of the creek; it took the balance of the artificial dam out; gouged away a portion of the old original north bench of the dam—of the creek—gouged out a hole I should judge from four to five foot deep in the old creek bed.

Cross Examination:

(By Mr. Maury).

I don't know for sure when the storm was that cut the first hole through that dam; I didn't live



(Testimony of L. B. Bryson.)

there at the time it occurred. I could see that there had been a big hole cut through that dam by a previous storm, and that happened before I went there. I went there in November, 1925. I do not know from my own knowledge, how many inches of water fell up there that night—June 6th and 7th. Right in front of my house the water was clear out of the banks of the creek. As to the width of the banks: right in front of my house it is a considerable distance because there is a bank on the north side of the creek, but there isn't on the south side, because the land slopes. The creek at the peak of the flood in front of my house might have been at least 20 rods wide. There are  $16\frac{1}{2}$  feet to the rod; the creek was all of 320 feet wide. I don't know how deep it was at its peak; at its peak, it was deep enough to go over the road grade, which must be about, I would judge in the neighborhood of six foot high. There was enough of it went over the roadway so that after the storm subsided and the water fell, there was more than two feet of hail and other stuff piled on top of the road there. I have seen storms often where they come down to coulees and down to a fence, and I have seen five feet of hail piled up in a fence—corner or coulee. I haven't seen that very often, where it is five feet. That occurred where I lived in 1921, storm of that kind. [273]

Redirect Examination:

(By Mr. McCarthy).

The storm I saw of that character was at a place I was living in 1921. I moved into the vicinity

(Testimony of Earl W. Stark.)

of Ollie in November, 1925, and have been in the general locality out there since 1909.

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EARL W. STARK,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My full name is Earl Stark. I live at Carlyle, Montana, on the East Fork of Beaver Creek. I live near a place that has been identified on an exhibit in here, a map, near William Abrams; I live right with William Abrams now. In 1929, particularly on June 6th and 7th, I was living in a house right west of Mr. Abrams' place—of where he lives now. On defendant's exhibit Y-13, the circle around 10 in red ink, with the name "Abrams" opposite it, approximately locates my place of residence in June. I was at home on the night of June 6, 1929. Something unusual happened that night. In the evening of June 6th it rained real hard and then later on, that is along about between 7:00 and 8:00 I imagine it was, we went to bed and between 10:00 and 11:00, my father-in-law, Mr. Abrams, woke us up. At that time the creeks were running full. My father-in-law lived about half a quarter of a mile to the east of us. That was between 10:00 and 11:00 on the night of June 6th when he woke up and we got up. After we got up we decided the house he lived in was a stronger house than what

(Testimony of Earl W. Stark.)

we lived in, if there was a flood coming, so we got our family together and moved over with them. The elevation of my father-in-law's place compared with the ground elevation where I live, his house is sitting on kind of a knoll somewhat higher than what ours is, and on a stronger foundation. When I got [274] over to my father-in-law's place, I went down to the creek a couple of times to see if it was raising any and along after midnight I went to bed and about—it was somewhere between 2:00 and 3:00, that the water rolled in at the place; we could hear it running in the basement. That woke us all up and we looked out to see what was going on and we could see the water all around the house. From the house to the nearest point of the creek it was probably 250 yards. The ground line at my father-in-law's house as compared with the bank of the creek at the nearest place, is higher than the banks of the creek; I couldn't give you any idea just how much difference there would be,—there is quite a difference. The flood did damage or carried away buildings or property; it moved all the buildings where I was living and washed them away; it moved the house about a quarter of a mile and there was some of the buildings that we never did find, that is panels of them. There had been farm machinery left out in the yard; there was the farm machinery and wagons that was washed down the creek and also a Case engine that was washed to the creek. I had lived out in Beaver Valley along that creek since December, 1921. The storm of June 6th and 7th comparing it in extent, violence



(Testimony of Earl W. Stark.)

and intensity with any storm I had ever witnessed was worse than any I had ever seen around there. To the best of my judgment, the width of the high water—of the main flood water—in the vicinity of where I live was around 140 rods I imagine.

I recognize defendant's exhibit D-13. I am the one sitting down in the picture; that is where it left my house after the flood. That is the house I referred to that was washed away in the flood.

Mr. McCARTHY: Defendant's D-13 is offered. It shows the house that was carried a quarter of a mile.

Mr. COLTON: I don't know what the purpose is. (Argued).

The COURT: Well, I will permit its introduction. You [275] may object and save an exception.

Mr. MAURY: We except.

### Cross Examination

(By Mr. Colton).

I live 7½ miles from Ollie. I heard Mr. Bryson just testify on the witness stand that the flood at Ollie had been there at 9:00 o'clock. That flood that hit Ollie didn't reach us. That flood that hit Ollie hit the creek south of us; the flood that hit us came from the Carlyle country. I live around 31 miles from Wibaux. I don't know how far I live by the meanders of the stream; I couldn't say about that; I wouldn't want to say whether it was at least twice that. Mr. Bryson, the gentleman who just testified

(Testimony of Earl W. Stark.)

before, would be around  $38\frac{1}{2}$  or 39 miles from Wibaux.

I was living in that vicinity of the country during the year 1925. We had some high waters at that time, but we didn't call it a flood. That flood did not wash out all the bridges on the East Fork of the Beaver Creek; it washed some of the bridges out, I don't know how many there was. There was some that was washed out entirely and there was some that it didn't take clear out. I don't know anything about the dam that counsel for the defendant examined Mr. Bryson on—when it was washed out. Some of those bridges that were washed out clean during the flood of 1925 were east of us; the one west of us I don't believe went clear out.

I testified on direct examination that there was a difference in elevation of the ground where my house stood and that of Mr. Abrams' house. I don't know how high my house would be above the creek level; I wouldn't know just how high it would be above the creek level. I said I moved from that house because I was afraid of a flood coming and I moved to Abrams' because it stood on higher ground. You can see—

Q. Well, we are not down there; we want you to tell us.

A. You want the difference between the two places? [276]

Q. I want you to estimate how high the house that was washed away in this flood—your house—was above the bottom of the creek?

(Testimony of Earl W. Stark.)

A. Well, I don't know just how high that would be. It was not right on the bank of the creek; it was back 300 feet probably from the creek. It was not in a low place. It was up a little higher than the bed of the creek of course.

Q. How much higher? We want to give the jury some idea.

The COURT: He says he can't tell.

Mr. HALL: How high was the bank, from the creek up to the top of the bank?

Mr. COLTON: I am examining the witness.

Q. Was it three feet?

Mr. McCARTHY: What was three feet?

Mr. MAURY: We object to the interruption.

Mr. McCARTHY: We object to the form of the question, not being an intelligent question.

(Question repeated).

The COURT: Can you answer it or not? If you can make an estimate of height, say something. We want to get through with this.

Mr. McCARTHY: Maybe he can point out on the wall how much higher it was.

Giving you some idea,—you want from the bed of the creek up to where the level of the house was? It would be probably 12 or 14 feet from the bed of the creek.

During that flood there was no water on the floor of this Abrams house that I went to. Abrams' house is right on the flood plane of where the East Fork goes through, and there wasn't any water on the first floor of Abrams' house.



(Testimony of Earl W. Stark.)

Redirect Examination

(By Mr. McCarthy).

Mr. Abrams' house was probably two or three feet higher [277] than my house and the water was all around the Abrams house. None of it got in on the floor. That water was up to the Abrams house; the first floor was about four feet from the ground; it is on a foundation,—raised up. The water got all around the house but the foundation was high enough to keep it off of the floor. My business is farming.

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AUGUST W. MOLINE,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination

(By Mr. McCarthy).

My full name is August W. Moline. I live about 10 miles west of Carlyle and one mile south; it is about three miles west of the Beaver, on Ash Coulee. Ash Coulee empties into Beaver. I am a farmer. I have lived at my present place of residence since 1909.

I was at home on the night of June 6th and 7th. There was a storm out my way. Describing the best I can that storm: it was raining some in the evening of the 6th. During the night we had an awful hard rain and I got up about daylight, somewhere about

(Testimony of August W. Moline.)

4:00 o'clock and we seen more water than we ever had seen before. The water right in between my house—well, it wasn't right up to the house, but it come inside the fence and down; the width was something like 30 rods or 35 rods; about 35 rods was my best judgment as to the width of the high water at my place. We could see where Mr. Stark lived and his father-in-law, Abrams, from my place—we could see the porch, and we went upstairs and we could see it better. Describing what water was there and how it was: when we went upstairs we could see it plain and it looked like a good-sized lake over there. The water was not standing still; the water that went by our place went pretty fast. Where the creek was straight that water went straight; other places, it [278] come right straight across. By "straight across" I mean it left the main channel of the coulee; it cut across bends.

Q. Can you give us any idea of the speed of the water and velocity as it passed your place?

Mr. MAURY: We object to that. There is no evidence here that that was in Beaver Creek; it was a tributary of Beaver Creek.

The COURT: It was going down Ash Coulee and it was emptying into Beaver Creek wasn't it? Overruled.

Q. Can you give us any idea of the speed of the water as it passed your place?

A. Around 7:00 o'clock the water was down pretty much. That bridge over there, you could see

(Testimony of August W. Moline.)

half the railing on the bridge by 7:00 o'clock. You couldn't see anything of the bridge at 4:00 o'clock; it was all over the bridge.

Q. Could you give us any idea at 4:00 o'clock, when you got up and looked out, could you give us any idea of the speed or velocity of the water at 4:00 o'clock?

A. I don't know whether I could or not. It roared along pretty fast; you could hear it quite a ways.

Mr. MAURY: We move to strike out the answer as not responsive and indicative of nothing.

The COURT: Yes.

I have no way of giving you the miles per hour of the speed of that water. I don't think I could walk as fast as it went, I know that. I can walk four miles an hour; I know that I used to do that. Of course, I can't know what the volume of the water was that had been passing my place before daylight; it had been high quite a while and at some places it looked like it had been a little higher. Compared with any other storm we had from the time I lived there from 1909 on, we hadn't had anything to compare with that. [279]

Cross Examination:

(By Mr. Maury).

I believe that we did have a storm there in 1925. I think it carried out some bridges, I don't remember how many. As to where any of them were,



(Testimony of August W. Moline.)

I guess there was a grade west of my place. I am thirty miles probably on the meanders, from Wibaux; that is not straight across, that is the road; I could not tell how many miles as the stream meanders. I don't think it would be twice as far if you went around all the meanders of the stream; I couldn't tell whether it would be one and a half times as far.

I guess that water of the storm of 1925 got to Wibaux,—it runs that way. Some of the water seeps in the ground during those storms. The water I saw never could get through a little space on the model here (counsel indicating a point on model).

Q. Take a look at this.

A. No, it couldn't. It depends on how wide that is, from this point (you are indicating on the model) to this house over here. If this is only 600 feet wide and 11 feet deep at the deepest, as you say, that water I don't think, could get through there. I don't know whether it would ever get through a space 420 feet wide and 16 feet at the deepest. As to whether it could get through a space 420 feet, I never measured it from the creek. That would depend a good deal on the depth of the creek too whether it could get through that kind of a space. If it was not more than 16 feet at the deepest, I don't know whether it could get through that; what water we had went through there, we know that. It did go through; it didn't stand still. Some of it went in the ground. In that distance, an entire seepage of two or three feet of water will go

(Testimony of August W. Moline.)

right down in the ground; that depends on the season.

I wasn't there, to know whether the storm of 1907 entered the ground before it got to Wibaux; I went there in 1909. [280]

We had a storm there in 1921; I don't remember how big a storm. In 1921, some bridges goes out, it seems like; we had a heavy storm.

Q. Did any bridges go out in 1929, on June 7th?

A. Yes.

Q. Which one?

A. There was one a mile down the road went out; it washed away on one side of it; the bridge was there. That is not the bridge that sunk the next day; this is a bridge up nearer my place; this is only a six-foot bridge—six foot wide and 16 feet long. That bridge near my place didn't go out; it washed the dirt away from one side of it and that bridge sunk a little bit—one corner of it did; it wasn't gone. There was another big county bridge and one end sunk; that was on the main Beaver. I don't think it was moved five feet out of its place on one end; it just sunk down, I don't think it moved; it washed a pier away, then it sunk. All that water that I have been describing didn't run through or over or by that bridge; the water I described is just the water through Ash Coulee. Ash Coulee runs into the Beaver about  $\frac{3}{4}$  of a mile above the steel bridge—above the bridge that sunk.

Q. All the water you are talking about, except

(Testimony of August W. Moline.)

what soaked into the ground, went by that bridge, that one end sunk 5 or 6 feet?

Mr. McCARTHY: Objected to as repetition.

Q. We want to get at it.

A. I was talking about Ash Coulee and you were referring to Beaver.

Q. But all the water you were talking about, as having formed near your place, went under or around that bridge, except what soaked in the ground?

A. It had to go there.

The water from Abram's place had to go by that bridge. The water Bryson was talking about went by that bridge. I don't remember how big that steel bridge was; I don't remember how long that bridge is; I crossed it lots of times, but I don't remember it; it was quite a large bridge. [281]

Q. It was mostly wood and steel and——

A. Steel and concrete and——

One of the concrete piers went out.

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CHARLES M. LUND,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy):

My name is Charles M. Lund. I live 28 miles south of Wibaux, 20 rods east of Beaver Creek up



(Testimony of Charles M. Lund.)

on the bank. My house is not on a level with the creek; it is up high; the house is about 38 or 40 feet above the bed of the creek. I have lived there 25 years. I was at home the night of June 6th and morning of June 7th 1929. Referring to exhibit Y-13, that is the location shown on there; where the name "Lund" appears is approximately correct as to the location of my place,—32, that is correct. As to a tributary of Beaver Creek, east of me there is East Fork you know, that empties into Beaver Creek; that flows from the Carlyle country and it flows southwest; it empties into Beaver Creek south of my place a little over a mile, straight across. My business is farming.

On the night of June 6th and morning of June 7th we had a storm at our place. About 11:00 o'clock the night of June 6th we had an awful heavy rain—the hardest rain I ever seen there since the time I was living there and it was an electrical storm—very bad—and the water just came down in torrent on the flat below me, that section 31, the main channel of Beaver. I looked out and in a flash of lightning I could see water across the flat a distance. The water wasn't still in the creek bank at that time, it was all over the flat. In width it varied from half a mile to  $\frac{3}{4}$  to a mile in a couple of places. That was about daylight I went down and stood on the creek bank; I would call daylight about 3:00 o'clock in the morning. About 3:00 o'clock I got out [282] of the house to look around, I went

(Testimony of Charles M. Lund.)

down on the creek bank and stood there and watched it, and there was water all over the flat; and on section 36 west of me, there is a valley comes down that drains quite a territory from the west. The water kept coming, tumbling down; it looked like a snow-bank or waves or whatever you call it; and there is another section that it come tumbling down and come on into Beaver flat. I would say that water wasn't still; it was traveling at a very rapid rate of speed. The rapidity at which that water was moving would be hard to say; it was traveling very fast. I couldn't keep up with it walking. I don't know how fast I can walk; I used to be a pretty good walker; about four miles an hour I think I could walk. It certainly was traveling that fast—four miles an hour—of course I am not certain. My judgment is that it was certainly traveling that fast anyway. That water I saw didn't move along the course of the creek or wander across the way the creek does; it cut straight across the country, across the valley. It would vary in the distance how far it was cutting across the turns there and going in a straight line; I couldn't just say, but you know, it cut off all the crooks and bends of Beaver Creek anyway, and it was coming across the flat on the west side anyway as far as I could see. I can see about two miles, probably a little better, from the west of my house. Compared with any storm out in my country during the 25 years I have

(Testimony of Charles M. Lund.)

been there, this storm was the most water we had ever had.

Cross Examination:

(By Mr. Colton).

I live about three miles straight across from Abrams. I never went to bed, I stayed up all that night; I was nervous. It was the highest at my place from 3:00 to 5:00 o'clock in the morning. This water I saw coming tumbling down from the hills toward the west was coming towards Beaver Creek, not in a dry [283] draw, it is not a draw; it is kind of a valley slope on the side; well, it headed for the flat. Naturally, the east side of the section where the creek travels, the land is lower, but there is water clear across there, one mile across. I saw the water coming over those flats there at 3:00 o'clock in the morning; I was looking towards it; it was heading into 31.

Q. Counsel asked you if it was going along the meanders or oxbows, or straight across. Could you look and see if the water was going straight across looking at the water in the creek, or to the outside? Could you tell whether it was going at the same rate of speed?

A. No, I could not.

Q. You couldn't differentiate the difference between the water in the stream proper, and the water outside the banks of the stream?

A. It was all traveling plenty swift. I didn't pay much attention at that time whether there was



(Testimony of Charles M. Lund.)

any difference in the stream; I was thinking about different things that morning.

There is a bridge close to my place. That is the bridge across the main channel; I heard Mr. Moline testify about it. All of the water from Ash Coulee and all through there, comes through that bridge, as long as the water stays in the bank; it has got to come up that valley by the Beaver, certainly.

Q. Some years past there was a pier that was washed out in the 1929 flood that was damaged a year or two before that?

A. No, sir, not on the east,—on the west side. I don't know an awful lot about it. I do know that in 1925 it was damaged on the west side and they cemented it in there on the west side. That was damaged some years before this flood; I couldn't recall the year, I remember when it was. During the morning of the flood after the flood subsided, my son drove over that bridge. To the west of Beaver Creek where the water comes down over 36, as I testified to, there is no road that comes down there; it is just prairie. During the year 1925 I lived down in that vicinity; I lived right [284] where I live now. I have seen a scene like that (in plaintiff's exhibit X-7); it must have been in 1925 if I remember right. I can't recall who that is on the horse there. This picture was taken—it was down on the flat, 31; it looks like the flat of 31 below me. It isn't so very many rods from my place. It is

(Testimony of Charles M. Lund.)

right near Beaver Creek on the west side of Beaver Creek.

Mr. McCARTHY: No objection.

The COURT: It may be received in evidence (X-7).

During the year 1925 we had quite a flood down there. The flat around my place wasn't all covered; the creek was out of its banks. It went up quite a ways on trees.

I told counsel I never saw it rain as hard before at my place as it rained on the night of June 6th. I have seen it rain awful hard before, but not for such a long duration; I have seen it rain hard for a short duration, for 20 minutes. I have seen it rain just as hard as I seen it on June 6, 1929, just for a short period, right at my place. I have seen it rain and move rocks at my place, enough that a man couldn't hardly lift; I can't recall the year I saw that. We have had severe cloudbursts and very heavy rains in the vicinity of where I live and in the vicinity of where Mr. Abrams lives and Mr. Moline. In 1912, we had the heavy rain; I think it was July 3, 1912, if I ain't mistaken. It was a very heavy rain; the creek left its banks. That is about all I can say about it. I haven't the slightest idea of how many inches of rain fell at that time. I wouldn't know what to say as to what fell on June 6th, 1929,—June 7th; it was an awful lot, that is all I do know. I have no way of telling, you see. There was no storm there in 1917 that I know of.

(Testimony of Charles M. Lund.)

I have seen evidence of high-water marks of a flood that occurred before I went to that country. I couldn't say what flood that was; it was before my day. I don't know as to the marks of that flood being higher at my place than the flood of [285] 1929. Of course, that is quite a few years ago. But I saw the high-water marks of that flood at my place when I moved in there in 1909. Those marks were somewhat higher than the flood of 1929, but evidently, those trees would have grown some, but the marks were in the trees and those marks were higher, I think, than the flood of 1929; it is pretty hard for me to say how much higher; it would be guess-work if I do,—possibly a foot and a half to the best of my judgment. I have heard about that flood occurring in June, 1907.

Q. You don't think those trees grew two feet in two years do you? Do you think the marks raised right up?

A. Well, that is 27 years ago.

#### Redirect Examination:

My idea is that the high-water marks of some flood in the vicinity of my place before I moved in there, left some sort of a mark on a tree, and it is my idea that that tree grew, so that in 1929, 20 years after I had been there, I figure the mark had come up as a result of the growth of the tree.

Counsel asked me about there being lots of water in the vicinity of my place in 1925, and I said "there was lots of water there in 1925," and I said



(Testimony of Charles M. Lund.)

“but”—; I wanted to make a comparison. There used to be some old straw piles down on section 31; that is what I gauged the water by. The 1925 water, it went down to those straw stacks, and in 1929 the water was all over that flat.

Q. How about 1929 (1925?) ?

A. That was just a heavy rain and the creek filled up and it started to take off to the sides. I spoke of the duration of the storms. As to this rain of June 6 and 7, 1929, in the vicinity of my place, it poured from 11:00 in the evening until break of day in the morning.

Recross Examination:

I said those straw piles were there in 1925; the same straw piles were not there in 1929. [286]

Redirect Examination:

As to how I was using those straw piles as marks, those old straw piles were there for several years. When this water came in 1925 it went down to the straw piles. In the flood of 1929 the piles weren't there, but the whole flat, section 31 where it was level, was covered with water, but I am using my straw piles as marks as to the location.

Recross Examination:

Q. You live right close where Ash Coulee and East Fork enters into the Beaver? Those two tributaries enter in close to your place?

A. Ash Coulee empties into Beaver one mile

(Testimony of Charles M. Lund.)

south of me and East Fork comes from here and enters about a mile south.

Redirect Examination:

Ash Coulee flows from west to east and the other coulee from east to west.

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J. M. SHEA,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is J. M. Shea. I live about 15 miles south of Wibaux. I am farming. I have lived at my present location about 14 years; have lived in the Beaver Valley about 25 years.

I was at home the night of June 6th and morning of June 7th. My residence is right on the west bank of Beaver Creek. It is about  $\frac{3}{4}$  of a mile downstream from where Lane Steer enters into Beaver Creek. That flows into Beaver Creek from the southeast—flows from the south and the east. We had a storm over in our country the night of June 6th and morning of June 7th.

Q. Will you in your own way, describe that storm to the jury?

A. The afternoon of June 6th it rained hard from about 3:00 to 5:00 o'clock, and I was under the impression that it rained most [287] all night.

(Testimony of J. M. Shea.)

Mr. COLTON: We move to strike that—the last part of that answer—“under the impression it rained all night”.

The COURT: Well, it is hardly responsive.

The night of June 6th I think I went to bed about 9:00 o'clock. It was raining at that time. After I went to bed, I couldn't give you any idea as to the character of the storm—whether it was light rainfall or heavy or what. Just prior to the time I went to bed it hadn't rained so hard as it had in the afternoon. In the afternoon it was the hardest rain I had ever seen. I got up about 3:30 on June 7th. When I got up I found the water was close to the house at that time, so I began to move out. My house was about six or eight rods from the creek bank. I would say the elevation of the ground at my house was about 20 foot higher than the bed of the creek. When I got up the water lacked perhaps four feet of getting up where the house was at that time; it wasn't within four feet of the house or four feet from the house; it lacked a raise of about four foot. While I was up there the water kept raising; it was raising quite rapidly. Giving the court and jury an idea of how rapidly the water was raising, will state that I left there in about half an hour after I got up; by that time the water was all around the house. It had to raise four feet to get up to the house and in half an hour I left and by that time, the water was all around the house. I mean that by that time, the water had come up



(Testimony of J. M. Shea.)

four feet in half an hour. Taking the highest point there when I left, the width of the water across the valley must have been about 40 rods I would say. That water wasn't standing still; it was flowing. I would say it was flowing a little faster than a man could walk. As to the rate of speed I have in mind for a man walking, I believe four miles an hour would be fast walking. I think the water was going perhaps a little faster than that. I couldn't say how [288] much faster than a man walking at four miles an hour, but just a little faster.

My hogs woke me up that morning. The flood moved a number of buildings at my place. It moved one granary that had a little grain in it, about 20 rods. It is 14 by 20 and a 14-foot chicken house built on one end. Another building moved was a small granary. There was also a small barn moved; the barn was moved about 10 rod.

I pointed out the high-water marks later to Mr. Oien. I was living at the same place in 1921 that I lived at in 1929. We had high water in 1921 at my place. The water was much higher in 1929 than it was in 1921,—I believe it was 12 or 13 foot higher. The storm of 1929,—the flood I saw there in June of 1929, was much higher than any other water I had ever saw.

#### Cross Examination

(By Mr. Colton).

I was under the impression that the 1921 flood didn't extend very far south of my place. I don't

(Testimony of J. M. Shea.)

know anything about the extent of the 1921 flood north of me to Wibaux and east of me to Medora; I was under the impression that the bulk of the storm was north of my place, and I don't know how far that flood extended east. I wasn't in Wibaux during the 1921 flood and I don't know anything about the condition of the town of Wibaux during the flood of 1921. I wasn't in the country in 1907. I have lived there on Beaver Creek 25 years, not all that time where I am now. I have lived south of Wibaux on Beaver Creek 14 years.

There is a wooden house—frame building—at the bend of the creek southeast of my place that was there on June 7, 1929. That building was torn down; it has been taken down. That was a wooden building. On June 7th that was four or five rods from the banks of Beaver Creek. The water of June 7th moved that building a few [289] feet. It was setting on rocks, and a wooden building. As the creek goes by my place, there are three banks right at the house, and my house is setting on the third bank. I made the statement that that bank was 20 foot above the bottom of the creek; that is my estimate; I never measured it. My house doesn't set on the second bank of the creek; it is on the third. I don't know whether the third bank is a defined bank; it is a bank to the stream, and my house is right on the same level with the top of that bank.

It must have been about 4:00 o'clock when I left the house that morning. The direction I went was

(Testimony of J. M. Shea.)

north a little ways, then west. I drove through water. The water was just about to the running-board on the car. The water was running fast. I couldn't say whether it was running as fast as the water in the creek right by my place; I wouldn't imagine it was though. My house is right on the valley level. So when the water got high at 4:00 I got in the car and drove away. It must have got higher after I left, perhaps a foot higher. I imagine the water was 12 or 14 inches deep when I drove through it. The average depth of the water at my place over the fiat there would be more than two and a half feet, I would say six inches more anyhow. I was driving a Ford car that morning. I left at 4:00 o'clock and I drove that Ford car from my place towards higher ground. That water didn't get up on my engine. When I drove through it, the water was up to the running-board of the Ford car. I didn't see a wall of water coming down.\* It is about 15 miles.

Q. Now, under ordinary high water in the creek, the creek comes bank-full at your place, how long does it take that water to get to Wibaux?

Mr. McCARTHY: Objected to, unless he is going to tell whether the water stays in the creek or cuts across the bends. [290]

I have seen water bank-full at my house.

Q. How long did it take that water to get to Wibaux?

Mr. McCARTHY: Running at what speed?



(Testimony of J. M. Shea.)

Q. That is what we are trying to find out. How long did it take that water to get to Wibaux?

Mr. McCARTHY: Objected to as indefinite, unless he gives the speed of the water.

Mr. MAURY: That is what we want to find out. I have seen the water at my place bank-full.

Q. Have you observed, on any occasion, how long it took that water to get to Wibaux?

The COURT: Were the banks full or overflown?

Mr. COLTON: Banks full.

Mr. McCARTHY: Objected to as immaterial as far as this case is concerned.

The COURT: Let him answer the question.

A. About fifteen hours, I have noticed it, it would take it.

#### Redirect Examination

The water wasn't moving in the banks on the morning of June 7, 1929, when I got up; it was cutting across. When I left my place in the Ford car, I took my family with me.

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#### JOHN EFTA,

being first duly sworn as a witness in behalf of the defendant, testified:

#### Direct Examination

(By Mr. McCarthy).

Mr. MAURY: To preserve our record, your Honor, in view of the testimony of Mr. Shea that

(Testimony of John Efta.)

it took fifteen hours for water going bank-full, in going from his place to Wibaux, we move to strike out the testimony of every witness of the defendant so far, because it shows the conditions are not similar; that it could not possibly have had any coadunation [291] of the flood at Wibaux that took place, and it was entirely concluded before 1:00 o'clock on the day of June 7th.

The COURT: Motion overruled.

Mr. MAURY: Exception.

I live 22 miles south and one mile west. I have lived in the Beaver valley 26 years. I was in Wibaux on the afternoon of June 6, 1929. I started for home about 4:00 o'clock. I did not get home, because the water was too high; I couldn't cross the bridges on the Wibaux road. I went south when I left Wibaux at 4:00 o'clock; went 11 miles south before I stopped. When I found I was stopped because of the water condition, I just backed my car on a higher spot and I walked east one mile to Robert Wicke's ranch. Robert Wicke's house is located on section 36—15—59. On defendant's exhibit Y-13, where the name "Efta" appears, that is where Mr. Wicke lives. I got to Mr. Wicke's place about half past five. My business is farming. The Wicke house is on the west bank of Beaver Creek; it is about 200 feet from the creek. The house is about 7 foot above the bottom of the creek. I stayed on the Wicke place that night. Something happened that night of an unusual nature in the way of a

(Testimony of John Efta.)

storm. When we got to Wicke's place, we stayed there for an hour or so and then I went back to the car. By "we" I mean my wife and I. I went back to the car to lock up the car and when I come to the car, the water was down on the Wibaux road and then I walked back to Wicke's place about one mile, after my wife, so we could go home and when I got over there, there was a dry creek on the west side of the house that just was filling, and kind of a dry swale, dry creek,—and I got to the house and I told my wife we could go home, and I turned around and the dry creek was half-full and we couldn't cross it. We decided to stay at Wicke's because we was compelled. During the night, the water was raising all the time slowly until 12:00 o'clock. At 12:00 o'clock the water [292] begins to get in the house already and I didn't went to sleep; I was watching the water, and I told my wife, I says, "We will have to move to the barn from the house" because the barn was higher than the house, on higher ground, and we waked up his hired man and at 12:00 o'clock at night we walked into the barn. He was Robert Wicke's hired man. The Wicke's weren't home at that time; his home is in North Dakota; he had a hired man over there at the place to take care of the place. I woke up the hired man and my wife and I went to the barn. When we went to the barn, it was raining awful heavy. We got to the barn. The barn was 200 feet I should judge from the house. I should judge the



(Testimony of John Efta.)

elevation of the ground the barn rested on was four feet higher than the elevation of the ground that the house rested on. We stayed in the barn the rest of the night. I got up about 4:00 o'clock in the morning and went outside and the water was just about two feet from the barn already at that time; it was up to within two feet of the barn. When I got out in the morning, I was watching the water about two hours, until 6:00 o'clock, and at 6:00 o'clock I looked towards the south and the water making kind of a funny move, and I looked towards the south and it got kind of dark and I looked a little closer and I saw kind of a wall or wave of water about six feet high, and I jump in the barn and told my wife we would have to move up in the hay-loft and as soon as we got in the hay-loft, the water was about four feet in the barn—came up to the height of four feet; that is, four feet in the barn. Buildings or property of Mr. Wicke's was moved; there was a granary 16 feet wide and about 30 or 35 feet long—that moved. There was some grain in it, but I don't know how much. That granary was moved, I would judge, about a mile and a half. Some other property was moved there—some small buildings. We got home June the 8th, after dinner.

Q. Before we get to that, what time were you able to get out of [293] the barn?

A. The same day,—the 7th of June. I get out about from 5:00 to 6:00 o'clock, I could walk around the barn,—in the evening.

(Testimony of John Efta.)

I got home on June 8th. As to what damage, if any, I found had occurred at my place, there was a lot of fences tore up on the Beaver Creek and washed out a lot of grain. I had a steel fence at my place,—steel posts, and the steel posts were set down in the ground. There was around 30 or 35 of those steel posts broken even with the ground.

Cross Examination

(By Mr. Maury).

Frank Miesoloski's is the next house downstream from me—from where I was that night at Robert Wicke's—he is below that Wicke's ranch. After Miesoloski, going towards Wibaux, it is Ronellenfitsch next. The next house towards Wibaux, below Ronellenfitsch is Phillip Zinda's, and Mr. Brophy's comes next. Clem Parker is next after Mr. Brophy, and next after Clem Parker is Joe Burke; then it is Wibaux. Massey's ranch is in there; it is close in Wibaux.

Q. Coyne lives across the river?

Mr. HALL: Across the creek.

Q. Across the creek or river; it is a river. Do you know about that?

A. I don't know.

It is 11 miles, something like that, on the road, from where I was, Robert Wicke's place on the night of June 6th, to Wibaux. That is pretty hard to say how far it is by the meanders of the stream. Whether it is approximately twice that far,

(Testimony of John Efta.)

it couldn't be answered, because it has got to be measured; I can't tell you. It has got to be measured before I could tell you. It is way farther on the meanders of the stream than on the road—than straight across. I wasn't on Duck Creek; the creek I was on they call it Dry Creek; I haven't got the name of what I am on. [294] It goes into Beaver Creek. Miesoloski is on the main Beaver Creek. That wave or wall of water went towards Miesoloski's. I didn't notice it when it passed Robert Wicke's; I just noticed it when it was coming in to Robert Wicke's ranch. I should judge I could see it for a distance of about 200 feet. The length of that wave was varying; there was places it was half a mile and places it was about  $\frac{3}{4}$  of a mile. I should judge it was, at the nearest point to me, from five to six feet high. Having been shown plaintiff's exhibit 22, that is in Wibaux—this side of Wibaux. That wave that I saw up at Robert Wicke's looks something like that, but it was from five to six feet high, but it was showing just like this,—showing something like that, but from five to six feet high.

Q. Come over here and show the jury what you saw that resembles that there?

A. It resembles the formation of the water like this (in exhibit 22), but it was from five to six feet high, rolling. I see something here that resembles it. It is pretty hard to tell from the picture how high this was, when you don't see it



(Testimony of John Efta.)

moving,—that is to give you an idea of my measurements. As to how fast it was going, I should judge it was 200 feet from the barn and I had just enough time to jump in the barn and got on the manger and there was four foot of water already in the barn. There was no minutes; there was only one jump.

Q. You came from that place to Wibaux soon after that? How soon after?

A. I left the place in the morning of the 8th.

Q. Which way did you go to Wibaux?

A. No, I went to Charlie Walters', west about two miles.

There was a second rise of water there on the afternoon of June 7th; it was around 2:00 o'clock in the afternoon of June 7th that it rose; I could judge that it rose about two feet. Before the second rise came, the first rise went down about three or four feet. I would say that the first rise above the ordinary [295] low-water level was about 17 feet high; then it fell back in a rough figure—I could figure from three to four feet; then it rose again about 2:00 o'clock, about two feet. It didn't stay up at that second rise; it just rise, then it was gradually going down. As to how long it was before it got back to the point where it had fallen three feet—say 14 feet high above the level of the creek—will say that the water went down about 6:00 o'clock in the evening, it went down about four feet.

(Testimony of John Efta.)

Q. Then, at 6:00 o'clock that evening, it was still 13 feet above? Do I understand that? Or was it down to four feet?

A. It went down about 6:00 o'clock, June 7th, in the evening, it went down to four feet.

Q. Down to four feet high above the creek level?

A. No; by the barn, from 17 it went down to four feet.

Q. Down to four feet?

A. Only four feet went down.

Mr. COLTON: To 13.

I was looking at that carefully. I could make the measurements after it finally receded, to correct my own views, and the first rise was to 17 feet above the creek bottom. That stood there at 17 feet; well, the 17 feet probably stand little over an hour—even. That hour was about 7:00 o'clock, then you see the water began to go down.

The COURT: Is that 7:00 in the morning?

Q. That is 7:00 o'clock on the morning of the 7th, isn't it?

A. Yes, sir, it begins to go down. It reached the peak—it reached the top about 6:00 o'clock in the morning, June 7th, at the place where I was; that was the highest spot that time. That was the highest water I saw there at all; then it stayed that 17 feet for an hour, and that was about 7:00 o'clock; then it fell back—it was gradually going down. Then there came a second rise. That second rise came at 2:00 o'clock, after dinner. The water rised then

(Testimony of John Efta.)

about two feet. It didn't go up to where it was [296] standing at 16 feet; the morning water was down from three to four feet from the top. It raised two feet when it came back at 2:00 o'clock. It is my best memory than then it stood at 15 feet high, something like that, about 2:00 o'clock in the afternoon. It started going gradually down right away. It was inside of an hour I believe, that the water was down to 10 feet high, that is by 3:00 o'clock; and by 4:00 o'clock the water—it was about one foot in the barn yet; that would be about 14 feet yet above the bottom of the creek. That was around about 4:00 o'clock it was standing one foot in the barn, in the afternoon of June 7th. As to when it left the barn completely—got down to 13 feet,—it leave the barn a little after 5:00 o'clock. A little after 5:00 o'clock, it was about I would say around 12 feet high yet. I didn't watch it until dusk came on—9:00 o'clock; I couldn't tell how high it was about 9:00 o'clock; I went to sleep—I was tired. Naturally, that wave or wall of water was across the valley. As to whether it was irregular, the marks irregular—up and down, or whether they were all on a level—it couldn't be on a level because they raised in the barn at a sudden, four feet.

Q. Did you take note of the water marks down around Parker's place?

A. No, sir.



(Testimony of John Efta.)

Q. Would you say that that phenomena that you saw could possibly have gotten to Clem Parker's place?

Mr. McCARTHY: Objected to as speculative—this man's guess as to whether it could or not. It is for the jury.

The COURT: Well, what the man knows. How far is Parker's place?

A. Parker's place is seven miles from that place.

I have never seen a phenomena like that before.

Q. Have you seen the results of them in that country, of some phenomena, where in an afternoon there would come down from a [297] coulee a large body of water and pile hail as high as five feet in a fence corner?

A. Well, I see a lot of trash along the creek, trees and fences, something like that, piled up by a storm all of a sudden—I couldn't say if five feet high—but I see a lot of trash. I didn't see that piled up all around by the storm.

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Testimony of

CHARLES C. HOLSTEIN,

who had been first duly sworn as a witness in behalf of the defendant at the trial of Case No. 2444, Wibaux Realty Company, a corporation, (and other cases) vs. Northern Pacific Railway Company, a

(Testimony of Charles C. Holstein.)

corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 12th day of January, 1934, was read at this time by the court reporter, as follows:

“Direct Examination by Mr. McCarthy:

“My name is Charles C. Holstein. At the present time, I live at Beach, North Dakota; I maintain my residence at Beach. I was living at Beach in June, 1929, but as far as my business is concerned, I am out at the farm about all the time. My farm is on section 21-13-60. With reference to Wibaux, it is about 12 miles southeast or such a matter. My farm is located on Duck Creek stream. Duck Creek starts about straight south of Beach, I should judge about seven miles, such a matter, and flows past my place and empties into the Beaver about three miles beyond, flowing northwest like. The junction of Beaver Creek and Duck Creek is just about three miles northwest of my farm.

I was on my farm June 6th and 7th, 1929. We had considerable rainfall on June 6th. It rained real hard on the 6th day of June and about sun-down the creek was about its highest that I had ever saw it before. Duck Creek is all of eight miles long, perhaps a little longer. On the afternoon, or towards evening, of June 6, 1929, it rained at my place. It rained very heavy, at [298] least in the afternoon, and about sun-down it pretty well let up. Well, the creek at that time was about as high as it usually

(Testimony of Charles C. Holstein.)

gets at a heavy waterfall. I went to bed about 9:00 o'clock, and it didn't rain any more until then, that is between 6:00 and 9:00; it quit raining from about 6:00 until sun-down, until 9:00 o'clock, and I went to bed, that is at 9:00, and I heard it raining pretty hard, and in the morning I got up about 4:00 o'clock and I went and looked out the window and I seen I was thoroughly surrounded by water. By "surrounded" I mean, the location of the building is at the high point at the flat there and so far, it hadn't been troubled with any overflow of water from the creek. We moved down there in the spring of 1908; that would be about 20 or 23 years that I had been operating that farm—that place. And at this time the flat was covered with water at the depth of about three feet—at least that was the point around the buildings, and about 80 rods each side of the building. It took about two miles of woven-wire fence and destroying a lot of other fence with it. I have mixed stock—cattle, horses and sheep. It took 240 head of sheep. The water came along and picked them up and packed them along; I mean that 240 sheep were drowned or lost,—they were gone; they were distributed all along my place, perhaps up to Wibaux. I didn't see so very many; I didn't see only half a dozen between my place and the Beaver Creek junction. I saw some of them beyond the Beaver Creek and Duck Creek junction to the north; there were a whole lot of them I never got to see at all.



(Testimony of Charles C. Holstein.)

Q. Now, Mr. Holstein, where is your house located with reference to the creek bank, as to the elevation? Let us take it from the creek. How far above the creek is the bench there opposite your house?

A. I would judge from the creek about four feet up to the level of the house. The height of the house above the bench of the creek is about three feet,—well, it is on a foundation of about three feet. On the morning of June 7th, as far as the house [299] is concerned, the water was up about two inches on the joist of the floor. As far as the place is concerned the water had never before overrun the place at all.

Cross Examination:

(By Mr. Colton).

I had never seen the water all over the flats there exactly, several times before—not at the point of the building,—place. I have seen water there over that flat east and west. I have seen water out of the banks of the creek since I have been there, but not where the building is. I have seen that phenomena occasionally. I had about 375 sheep in that band and there were 240 of them lost. As to where those sheep were in the night: In the evening, as a rule, they would come and they would bed at the bank of the creek there, but this particular evening—on June 6th—the water getting quite high, I suggested to the men that we take them over on

(Testimony of Charles C. Holstein.)

the higher ground about 100 rods from the building north, but they evidently didn't take them over there, because the water hadn't been that high during the night.

Q. And this rush of water caught those sheep close to the banks of the creek?

A. They shouldn't have been there. I told them to take them about 100 rods away from there. They were on lower ground than the floor of my house. As to the distance that my place is from Wibaux, following Duck Creek to where it would enter into Beaver, I presume it would be right about three miles where it enters Beaver. From the point where it enters to the bridge at Wibaux, I imagine straight across about eight miles. That would be about 11 miles altogether.

The first I noticed high water at my place was 4:00 o'clock June 7th, when I got up—that is when I seen the high water. It wasn't at its extreme height any more at 4:00 o'clock; it had gone down perhaps three or four inches when I first seen it. The water did get into my house—the basement was filled—It didn't [300] *didn't* get into the house; it got onto the stringers of the house, the joists. My house is about seven foot above the bottom of the creek.

Redirect Examination:

When I got up that morning, this water that I saw there was moving quite rapidly in a north-westerly direction. It was following straight across,

(Testimony of Charles C. Holstein.)

northwest slope. I mean it was moving straight across the country; it didn't follow the channel; it just followed right on through. I never lost any sheep or stock in high water before.

Recross Examination:

I wouldn't have lost any this time if they had stayed up on the high ground; if they would have stayed where I placed them, they wouldn't have got caught.

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JAMES LINN,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is James Linn. I live six miles south of Wibaux. My business is farming. My house is half a mile west of Beaver Creek. I am on section 11 and Beaver Creek is on section 12. I have lived where I now live 23 years. I was at home on the night of June 6th and the morning of June 7, 1929. We had a storm or water out my way. Describing that storm and high water at my place on the dates mentioned, my boy woke me up about a quarter to 3:00 o'clock, with a noise—noise from the creek. It was rumbling and rumbling quite a lot; you could hear it. I woke up and looked out through the window and I thought it was snowing from the looks of the water, so I



(Testimony of James Linn.)

had to go around and see about some stock I had and I took a walk down the road a little ways, my son and Joseph Kohl, and as I went along the road, it was [301] raising right along, the water was raising right along. When I got up and looked out the water was outside of the Beaver Creek bench a long ways, both sides; it would be out on the west side and it was over on the east side out too. My best judgment as to the width of the water there when I got up is that it would be half a mile wide. My son and I started out to round up the stock and so forth, there.

Q. What happened to the water? Did it go down or up, or——

A. Well, it stood still for quite a while going along there and I wasn't watching the water particular, but I could see the marks of what happened right along, it came out to the roadside; it forced a hay rack along to some boys that was camping and up to the roadside. As to the time that that occurred, I went down to the place about 6:00 o'clock and that hay rack and stuff was coming over to the roadside and I said to the boy, "We better get on higher land," but it didn't cross the road. When I got up and saw this water half a mile wide it was moving pretty fast. I couldn't give you any idea how fast it was moving, for I wasn't paying much attention to it.

Q. What have you to say as to whether this water that was moving that you speak of there,

(Testimony of James Linn.)

whether it was following the course of the stream or what it was doing?

A. Well, it was taking a lot of land with it and rolling it right along. I lost 40 acres of barley and two miles of fence.

Mr. MAURY: Will your Honor charge the jury at this time to disregard that?

Q. What I had in mind Mr. Linn, was whether the water was following the twisting course of the stream as it ordinarily does, or whether it was cutting straight across?

A. Well, it was following the creek on both sides.

Q. Well, was the water taking the bends of the creek?

A. Oh, yes; and the water was coming up on the high places and going down [302] in the low.

Q. It was coming up in the high places and going down in the low?

A. Yes.

Defendant's exhibit P is a typical section of the barbed wire that was twisted up in the manner that I have referred to.

Mr. McCARTHY: Defendant's exhibit P is offered in evidence.

Mr. COLTON: No objection.

The COURT: It may be received.

Q. On the east side of the road and south of your house, is there a grove of trees there Mr. Linn?

(Testimony of James Linn.)

A. It would be on the east side of the creek the grove of trees. The high water went up about eight feet high on some of those trees and it tore quite a lot of them out by the root; those were live trees that were pulled out; they were box elders. Those trees were eight inches likely—some of them eight or ten inches through, I mean eight or ten inches in diameter.

Cross Examination:

(By Mr. Colton).

Those trees were situated east of the creek. I could see the trees from where I was. I seen the flood tear them out—I see them go down right along. In some places the creek runs about half a mile east of my house, you understand,—because it bends you understand; right opposite my house it runs half a mile. In connection with my house, those trees were further south. I didn't get off of the main road that morning; the main road would be about 60 rods from where those trees stood. The trees that were rooted up didn't come out to the main road, they went on down the creek to the next fence or likely fastened in some of the fences. I seen some trees coming down there that morning,—those trees that I said were uprooted on the east side of me. They were a cluster of trees. If you never heard that before, I [303] can take you down and show you and prove it.



(Testimony of James Linn.)

Q. You testified at a trial two years ago in the case of Heckaman vs. Northern Pacific, tried at Baker about two years ago—a little more?

A. I was down there. I didn't tell you anything about those trees at the trial. That is all right—it is because you didn't ask me the question.

As to what time the water went down at my place that morning: Mr. Colton, I told you I was busy and I couldn't pay attention to it. I had something else to do besides watching that at the roadside. I was busy taking care of my own stuff. The water wasn't off of the flats at my place until 3:00 or 4:00 o'clock in the afternoon of June 7th 1929. I wouldn't be certain how deep it was all over the flats at 3:00 or 4:00 in the afternoon, but in the morning it went over the fence posts. I wasn't keeping any track of when this water was coming up or going down, because I had a little more else to do. There wasn't anyone down the valley the afternoon of June 7th who telephoned or sent warning to people of Wibaux to look out—that there was another flood coming up there on the afternoon of June 7, 1929; there wasn't any telephone going at that time, because it was washed out. I didn't go to Wibaux.

I couldn't tell you exactly how high my house is above Beaver Creek. That road I live on runs west at Beaver Creek and that road is on about the same level as the flats; of course, the road is somewhat higher, you understand, as it comes

(Testimony of James Linn.)

through there. My wife called up—she called up Wibaux and she couldn't get them; that must have been before 3:00 o'clock in the morning—about 3:00 o'clock. I live six miles south of Wibaux. At 3:00 in the morning, we had a terrific flood at my place south of Wibaux, and at that time we called up Joe Burkes, and at 3:00 my wife called up the folks at Wibaux. That is at 3:00 o'clock in the morning. [304]

Redirect Examination:

Comparing this 1929 flood of June 7th with any high water I had ever seen out around there before, will state I wasn't paying any attention; I never noticed any high water; I was out in the field; I didn't pay any attention. I have seen it up even with the bench—even with the banks—that would be even with the bench, wouldn't it?

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JOHN B. BROPHY,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is John B. Brophy. I live at Wibaux, that is Wibaux County,—5½ miles south of Wibaux. I am right on the banks of Beaver Creek. The creek proper is about 200 feet from the house

(Testimony of John B. Brophy.)

on the west side, and about 300 feet on the north side; it curves around my place. I have lived at that present location since 1887. I lived at my father's ranch in the Beaver Creek valley in 1882.

I was at home the night of June 6th and morning of June 7th, 1929. We had lots of water at our place. To tell about the condition of the water at our place, just what occurred and when it came up, is a very long story: At the time we retired—I stayed up all night myself,—all night until 20 minutes to 3:00 in the morning; that was the night of June 6th and early morning of June 7th, and my family retired about half past 9:00 and after that, I stayed up alone and took a flashlight I had to go out and examine the creek; I had kind of gauges there to see if it was raising or falling or what, and it was coming up steady all night, until 20 minutes to 3:00 I went in the house, and I worked pretty hard the day before and I just told my family I wanted to get in a few hours' sleep if possible, and they said, "Very well, we [305] will all watch." I could see it was a very dangerous stage at that time (that is pretty hard on me to talk louder; my throat is affected with laryngitis; I had an operation). All right, I will do the best I can: they said, "We will stay up and watch," and so I went to bed and as I remember, after I went to bed, I didn't go to sleep right away. I had a very heavy coat, but notwithstanding that, I got wet nevertheless, and it was raining quite



(Testimony of John B. Brophy.)

hard and it whipped that rain into a spray and it almost would go through a board, and after I laid down, I noticed it was breaking day and the birds started to sing, and all night long, it was thundering; it seemed to be about eight miles south-east of my place. In fact, it was the heaviest thunder—it shook the window glass in my house that distance, and it was raining very hard. As to whether at daybreak the water was still in the banks of the creek, or describing the situation: when I retired it was about eight inches under the banks, and I hadn't retired I don't believe an hour, and to be exact about it, I think it was about half past 4:00 and it was sun-up, and that was about the time of the longest day of the year, which would be half past 4:00, sun-up; and at that time, something struck the house and there was a great commotion, and I looked out the bedroom window and the water was just coming through the yard about 3½ feet high, and it seemed to have a rolling motion,—dead animals and hay stacks and everything else, and the situation after I woke up so sudden, it didn't look very favorable to me, because the water was just white with hail. As to how much hail there was,—it was broke up, one was trailing the other through, and then there would be two feet there would be none at all. Some of these things I saw floating were dead sheep—quite a few of them—and a few dead yearlings and two-year-old cattle, and dead horses, and there were

(Testimony of John B. Brophy.)

lots of hens. The water wasn't standing still,—it was moving very fast. The first movement of that water at my [306] place about daybreak, was slower than after for the reason that it filled all that low depression; it kind of diverted it a little, it kind of checked it a little. The width that it was across, at its widest place,—at my place, I would call it fully 3,000 feet or more; it was over half a mile.

The first thing that occurred to me was to get out and see if any passage was left open, and "beat it" before every passage was surrounded. I thought of the big butte not far off, east of my place, and I rushed out the door after I woke everybody and I went out 50 feet from the side-door, and I noticed my family was following me up and I told them to stay in the house until I got back. I couldn't see clearly to the east side to see—When they woke up and decided we better get out of the house—I didn't stop and dress, I got out as quick as I could. At that time, I didn't take time to put on my shoes or anything else; I just picked up a pair of overshoes to protect my feet after I got outside; I had on just my underwear. When I got out, the only place to go—the only thing available was where we dumped the ashes; we had been dumping there for quite a few years and it created quite a pile and that was the only thing visible. For some time I stayed there on the ash pile; at the ash pile, there was quite a lot of sod and earth. I didn't stay on the ash pile the

(Testimony of John B. Brophy.)

rest of the day. At the height of the flood—it wasn't exactly the height,—it was higher after, but after, everything was gone from my place, that granary just went out, and there were three No. 10 wires still attached to the clothes-line post, and I was in hopes to get to them and the wire and lay some protection from tree to tree and get my family where there was an easier tree to climb than the one in the immediate vicinity of the ash pile. I did not succeed in doing that; I got about half ways and I was taken off my feet and swept down the creek I should judge six feet, when I grabbed the first thing that I could get at, and it [307] happened to be an old branch of a tree and just a tiny twig, and I pulled myself to the trunk and I climbed that tree and I absolutely could do nothing then, I stayed up in the tree I should judge from half past 6:00 until half past 12:00—Noon.

Q. Were you in your underwear all that time?

A. Yes, sir.

Mr. COLTON: Move to strike out the last question and answer.

The COURT: I don't remember that he had any opportunity to return to the house.

The family all this time were on the ashes pile, and I was helpless; I couldn't do a thing. I had to rescue them—try to get them to this place; I was just about played out then. As to whether any articles came downstream and rested against this ash pile there that the family climbed up



(Testimony of John B. Brophy.)

onto, will state that the last thing that left my yard was a four-horse seed drill, I was sowing flax a while before, and it came through gentle and below, there was a plum thicket and it banked up and it detained the water quite a lot, but out in the main channel I should judge it run seven miles an hour. There was no comparison whatever between this storm of June 6 and 7, 1929, and with any high water that I had ever seen at my place before.

Cross Examination:

(By Mr. Colton).

Q. Mr. Brophy, you made a statement that the water was only seven miles an hour in the creek?

A. Yes, sir, I take this from observation; approximately seven miles an hour or more. That was right in the creek—in the channel. Any objects—and I seen lots of them going by—you would have to run to keep up with them.

I have lived in the Beaver Creek valley for quite a number of years. In 1885 I was East, going to school. I was in the Beaver Creek valley in 1883. During that time there were a few hail storms that I witnessed. I remember one that struck about [308] five miles south of Wibaux. That was a very bad one. It was a hailstorm and there was lots of water, and it didn't last very long; and one, the widest that crossed Beaver Valley, come from the west and crossed to the east, it didn't last very long, and it raised the water in the creek bank-

(Testimony of John B. Brophy.)

full. In fact, it come so sudden the creek run backwards for a ways and everything clogged up with hail and it looked like everything clogged where the water washed it, and a few times the narrower ones; they were the more vicious.

I worked for the Northern Pacific Railway Company, the defendant in this case, in the summer of 1888. I was doing general work mostly, that year; there was nothing else to do. It was a hard winter, 1886 and -87; it cleaned up the stock in the country. I have done some work close to the Northern Pacific bridge there, as it goes through Wibaux. I was responsible for the bridge and keeping it in repair; keeping it in repair was part of my duty. During the time I worked for them, as to whether or not any damage was done to the piers or piling of the bridge, will state that in 1889 the creek wasn't over two feet above normal and it had to come up. A huge chunk of ice would get up close and hit an object and it would stop it still—just like a locomotive of the Northern Pacific hit it—it was an awful weight. When it struck the piling of the pile bridge, it knocked out two piles of the bridge, that was at different—two different places—and knocked out the southernmost one of the stringer piles.

At the place where I live, I naturally have had considerable trouble with high water down there. Along the east bank of the creek opposite my house, I built a dyke,—nothing like the Mississippi River

(Testimony of John B. Brophy.)

dyke—it was about four feet or three and a half feet high. I built that dyke, or started it at least, about eight years ago. The purpose in my placing it there was to keep the water from running in my yard. It had been there just twice [309] while I lived there, before, and it done no damage to speak of; and I built it to keep it out.

Q. Of course, from your past experience in years that you lived there and your trouble, you were naturally watching the creek on the morning of June 7, 1929?

A. Well, the jury, they can observe that they can go to bed and have it off your mind when you have something that you know you are safe. Naturally, you can't sleep very sound if——

Q. And, of course, the water got very high, flowing into your yard? You knew that from past experience?

A. Twice; yes.

Q. On those occasions you had to move to higher ground? Did you go to the schoolhouse?

A. To the schoolhouse and to a neighbor's house that was handy. The water receded and we went back.

Q. Have you ever made any measurements in the past, and if so, when,—in its fall,—I mean rainfall?

A. Well, in 1921, a storm kind of worked in from the southeast. It was an awful dry year; there was no rain up until the 21st of June. A few broken



(Testimony of John B. Brophy.)

clouds started to travel west and it started to rain in very large drops, and my family says,—I was ready to go to work; I was doing some summer-fallowing out in the field—and my wife says: “It is no use; it is going to rain.” I disputed her, I says: “It doesn’t ‘know how’ to rain this dry year,” and about 15 minutes it just come down—it rained between eight and nine inches in—I should judge the real heavy part of the storm didn’t last over  $\frac{3}{4}$ ths of an hour. So it rained eight or nine inches at my place in about  $\frac{3}{4}$ ths of an hour. The way I measured it, there were several cream cans sitting out there on the table, and there was no wind with this whatsoever, and I would judge from that.

Due west of my place is what I would call a dune. Opposite my place, right straight west, the width of the creek is 200 feet from bank to bank. As to the tributaries that enter Beaver Creek between my house and Wibaux, east and west, both directions, there [310] are two on the east and on the west there are three, I think.

It stopped raining at my place on the morning of June 7, 1929, at half past 4:00. I can’t tell how deep the water got in my house on the morning of the flood. That question can be answered perhaps by my brother. It didn’t wash my house away.

#### Redirect Examination:

There is a bridge north of my place; it is right on my place. It is northeast of my house. There is a high hill or bank immediately to the south of the

(Testimony of John B. Brophy.)

bridge. As to whether the stream flows directly in a straight line to the bridge or whether it winds around this high bank, will state that after leaving the house, it flows easterly direction about a quarter of a mile and then turns back again to the northwest—makes a turn. In my estimation, not one-fourth of the water was flowing under the bridge, because there was so much trash coming down with the water that on every bend of the creek it would pile straw and all kinds of straw and Russian thistles, and so forth,—brush, and also diverted the water out of the channel, and instead of following the course of the old channel it took straight to the north; it went right straight north of my house.

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FRANK MIESOLOSKI,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Frank Miesoloski. I live 10 miles south of Wibaux. In June, 1929, I was living at home on section 30—13—60. That is just right close to the Beaver Creek, about 200 or 250 feet from creek. I moved there in 1922. My business is farming and ranching. I was at home on the night of June 6th and morning of June 7, 1929. We had high water and storm out my way. That was 1929, 6th

(Testimony of Frank Miesoloski.)

of June, between 5:00 and 6:00, heavy cloud [311] comes and quick—just simply come pretty fast and start rain. At beginning, wasn't so heavy rain, but towards last just like "upset the bucket". On level ground lots of water, about one foot of water. I said it was "just like somebody upset a bucket." When that heavy rain started in it wasn't so heavy, probably one hour or little better than one hour, but wasn't so heavy at beginning; this heavy rain probably only ten minutes last. After that rain, the first thing I went for cows. The cows was the other side of the creek, and there was water running down pretty fast, every place, and I tried to get the cows and it was a quarter of a mile to cows, the creek was raising so fast; when I come back with the cows I couldn't cross "him". When I went in and come back, it was between six and seven foot. The water raised six or seven foot when I went a quarter of a mile and back again. I suppose it took me half an hour, because it was muddy, to go and get my cows and come back again; it was slow walking. There was places water run down over a foot. It was right after 6:00 o'clock that this rise of six to seven feet of water took place,—right after 6:00, after rain,—between 6:00 and 7:00 at night; that is the 6th of June I am talking; this is all on the 6th, and I was trying to get the cows and I couldn't cross them; I got three home, and the others I couldn't make, because planks and trash and stuff started



(Testimony of Frank Miesoloski.)

*started* come in from bridges, so I got three home and the others I left other side, and I went get the three cows and I milk them and I do all the chores, and probably half past 8:00 or 9:00, the creek was about one foot from the top of the bank. I didn't go to bed right away; probably half past 9:00 I went to bed, but I went twice to see what was going on—to see the creek. Before I went to bed, I made two trips down to look at the creek, and all I could see was planks floating in the creek from bridges, and the last I went I didn't notice that it raised any more—just about [312] even—just about even with the creek bank when I went to bed, and when I went to bed it was something after 10:00, something like that; and at 2:00 o'clock in the morning, on the 7th of June, there was heavy lightning striking and shook house, and I look up, and I had big granary there, about 50 or 60 feet from the house towards creek; it was about two feet lower than the house; the water already swept that out. This granary was being swept away when I looked out at 2:00 o'clock; I could see that with the flash of the lightning. In the granary there was ground feed, probably 300 bushel ground feed, wheat, oats, barley—about 300 bushels of various kinds of grain. This granary I think was 12 by 16. I found out later where it went to; it didn't went far; it just hook in trees about a quarter of a mile and just hook in trees other side of creek, and

(Testimony of Frank Miesoloski.)

hook in big trees and it didn't go any farther; the trees stopped it.

I said at 2:00 o'clock I got up and there was this lightning, and I could see the granary going down, and then—the house was kind of weak—I took my family and went to barn. By “weak”, I mean pretty old house. So, barn very good shape; I built that in 1922. So, I took family and went to the barn. I figured that is what saved us. Then we stayed until good daylight, I should judge 4:00 or 4:20, I should judge sun, or sun-up, and the water went down. It was about 2:00 o'clock when we went to the barn; when we come out from house it was just 2:00 o'clock; I looked at the time, at the clock. There was about a foot and a half of water around the house and barn in the yard when we went to the barn. I could not see how wide it was. The yard near my house was just about 16 feet above the bottom of the creek.

Q. And on top of that there was a foot and a half of water?

A. The first one? Well, when we went to the barn, that much, and it raised some more. When we went to the barn, there was a foot and a half on the yard around the house, and that was 16 feet [313] above the creek bottom; when I went to the barn, took my family. After that, it was dark, I couldn't see; all the corrals and woven wire was washed out—woven wire fence out, but not barb wire—first the fences, but no barb wire; all the

(Testimony of Frank Miesoloski.)

woven wire was wiped out, I mean the woven-wire fences on my farm were wiped out. We stayed there in the barn until about good daylight; it was about 4:00 o'clock and the water went down, and I went home to start fire. The family didn't go with me; they stayed in barn. The water had gone down about three feet, from up-to-down. That is just about how it went down. Well, I got to the house; of course, the yard was dry at that time; I mean the one and a half foot of water was gone; and I start fire at the home and I was going to get breakfast, and "here come somebody like a racket"! and it started rising, and I looked out the window and wave come from Ralph Wicke's like ocean wave, and when I looked out at that window—when I looked to Ralph Wicke's place, I should judge 20 or 30 rods his granary already the water carried; that is Wicke's granary. So I grabbed some bread and milk and "beat it" to family—to the barn, and when I step out there was probably one foot of water—maybe not quite foot—something like that, and by the time I get to the barn, it was up to my crotch already. It was about 90 feet from the house to the barn, but when I went to barn I judge it was about 80 feet, because I got in corral—I crawled in corral, and from corral I went in top of roof; that was a short-cut; then I knocked hole down in roof and went in and give the family bread and come out and just at that time, there was cattle wiped out from the corral—those three cows



(Testimony of Frank Miesoloski.)

and there was two went with the stream out half a mile or little better was saved, and the other one went—Ralph Wicke's blacksmith shop went, come hit her and she was drowned.

This that I called an ocean wave of water that I saw come rolling across there, was coming from the southwest; that is the [314] way they come—from Ralph Wicke's straight to me; that big wave was coming from Ralph Wicke's place; the first water came from St. Phillips Creek; they call it St. Phillips Creek—no town, but a postoffice there. This first water came from the direction of St. Phillips. St. Phillips, from my place, is about a quarter mile southeast. Wicke's place is southwest from my place and this is southeast. The first rush of water, I said, came from the direction of St. Phillips. It is a pretty long creek there—this water coming down from St. Phillips; it is water standing here and there around in places. That is all I know, they call the creek St. Phillips, and there was lots of dry creeks running into that—into St. Phillips Creek. This ocean wave that I speak of, didn't come from St. Phillips; it come from Wicke's,—it came from the southwest and was moving northeast. I didn't know at first how wide that so-called ocean wave was; it was pretty wide, but when I come into the barn and I looked out, it was just about  $\frac{3}{4}$ ths of a mile,—this ocean wave was  $\frac{3}{4}$ ths of a mile wide when I observed it from the barn. As to how high: well, really, it looked higher to this—

(Testimony of Frank Miesoloski.)

I was figuring between  $2\frac{1}{2}$  or maybe 3 feet, and it come from Wicke's—maybe 4 feet, I could not say—I couldn't tell,—but the highest it come was 4 feet. Before this  $\frac{3}{4}$ -of-a-mile wave of water came through there, before that wave came, the width of this water was about 400 or 500 feet. You see, from the house it is lower there from the east; it was about 400 feet. You see, the creek itself was probably 75 feet, or maybe 65 feet, but there was a low place—between something like that, 400 or 500 feet. As to where this width of 500 feet of water, before the wave came,—where the 500 feet ran from and where it ran to,—that mostly run to the general creek—kind of go around—it follow the creek; it followed the creek. This wave of water I speak of moved awful fast. When I come out from barn and when it come against the fences—all the fences they are [315] built east and west—they just went like one shot; they just took right off. The other fences wasn't so bad off that way or ruined with water; they were just damaged and one thing or another; and all the fences go east and west they just wipe right off. This water that was there before the wave came it was running fast speed. Before the wave came, this water was running anyway seven or eight miles an hour, the very least. As to whether that water was making the turns and twists that the creek ordinarily does, before that wave came, will say that where it was high bank, it follow the creek; where low places, three or four feet lower,

(Testimony of Frank Miesoloski.)

it run across—that is the way it was. There was a difference in them banks,—16 feet in places, and 10 feet, you see lower. Well, where it was lower, it was going right across. Some places the water stayed in the creek because the banks were higher than other places, and other places where they were lower, it got out and went across. About the wave of water that came in there, as to what the water did then—whether it followed the course of the creek then—will say that it went right straight.

Q. What do you mean by “right straight”?

A. Through the field.

Q. Through the fields?

A. Through the field.

I am not still living at the same place; I move out. Before this 1929 flood, during the years that I had lived there, I had never seen anything like this before there. I moved about 70 feet on the bench. I built a new house, and barn and moved everything up on the high place.

There is a grove, or a stand of trees,—big bunch—west of my place and north. I have a suspension bridge there across the creek. Down near that suspension bridge there is a grove of trees.

Q. About how far are the trees from where your house and barn were in June, 1929?

A. You mean, where is that bridge?

Q. Yes.

A. I should judge about from 10 to 20 rods, start in around. The trees are mostly on the west



(Testimony of Frank Miesoloski.)

side of the creek; it [316] is on both sides. As to how high that ground is where the trees are, above the bottom of the creek, probably 10 or 12 feet and the other side about 16 or 18 feet. During the flood of June 6 and 7, 1929, there was some of it the fence hooked onto and pulled out—some of it the wire fence came against and just pulled right out by the roots. They were live trees, you bet. Those trees were mostly box elder and ash. Those trees were pretty big—probably two or three feet around, some of them. But those that were pulled out were pretty big trees.

After the flood, I found high-water marks in the trees.

Q. Tell us about those high-water marks—how high the water got in the trees and how high the trees were at that place above the bottom of the creek. You say you had trees some places 12 and 18 and 20 feet above the creek. Now, if you give us high-water marks on trees, I want to know which trees you are telling about.

A. Where there was 16-foot banks, it was probably 3½ or 4 feet of water, but where it was lower it was up to 9 feet on them trees, Where I say it was lower and the water got 9 feet up in the trees, the trees in that place were probably 8 feet above the bottom of the creek. So the water would be 8 plus 9, or 17 feet just about. That is my judgment, because the trees are not the same—places lower and places higher. I didn't measure it, but on that

(Testimony of Frank Miesoloski.)

suspension bridge, my poles stick out about 9 feet, and it just covered those poles.

I told you a little while ago about making this fire in the stove and that I heard a roar or noise like a car coming. That wasn't an automobile coming; that was water coming against the house and rubbishes, and it was kind of foaming; and there was chicken coops, you see it come from St. Phillips, and there was a bunch of pigs coming and hog-house and all them, and when one of them hit my corral, it just went in about 50 pieces. They come clear through to hit my one corral. That is the reason it smash [317] my corral; and that was about 10 minutes before the wave came.

Cross Examination:

(By Mr. Maury).

I was at Baker two and a half years ago at a trial there. At that trial, every night, I would be in the old theatre building there talking over my testimony with claim agents and attorneys. Then I came back to Baker as a witness in a similar case last September.

Q. And every night you would talk over your testimony with claim agents and——

A. No, no.

Q. You didn't talk it over then?

A. No.

Q. Your story, when you first told it at the first trial, took about four minutes to tell?

A. I don't know how long it take.

(Testimony of Frank Miesoloski.)

Q. Would you say that that (showing papers to witness) looks like your story at the first trial?

A. It is the same what I am telling now, isn't it?

Q. Yes, that is part of the same.

A. That is the same thing. Maybe one thing just about the other—very little difference. But this is the story at the first trial.

All the water I saw there stayed in the channel where the banks were higher and got out where the banks were low.

Q. Frank, the water was highest about 11:00 o'clock on the morning of June 7th 1929, wasn't it?

A. That is June 6th?

Q. No, on June 7th 1929 (showing papers to witness), the water was highest about 11:00 o'clock?

A. No, no.

Q. The morning of June 7th 1929?

A. It was, I should judge, about 6:00. I don't know, because I didn't have time.

Mr. MAURY: Have you got the record on him there? Where is that Mr. Colton?

Q. (Showing Transcript on Appeal, M. C. Heckaman vs. Northern Pacific Railway Company, page 759) Were you asked this question at a trial at Baker two and a half years ago? [318]

Mr. McCARTHY: I suggest you allow him to read it.

Mr. MAURY: Well, if he can read it.

A. I can English and Polish too.



(Testimony of Frank Miesoloski.)

I don't know whether I was asked that question at that trial two and a half years ago; I don't remember; I think you did.

MR. McCARTHY: Let him read it first Mr. Maury.

MR. MAURY: He has plenty of time to read it.

Q. "I tell you it is hard to tell, 11:00 o'clock, but I figure from sun-up, it started to make the second raise." Now, did you make that answer Frank?

A. Yes.

Q. And you went on further: "I suppose it was about half an hour; by that time took the machinery; then it raised another foot slow—another foot maybe slow, maybe hour, maybe half hour." Was that your answer?

A. Yes.

Q. At that trial?

A. Yes, water working just up and down after that wave come, it going up and down (indicating); it went down probably 6 or 10 inches, and then up again.

MR. COLTON: Up slowly?

A. Yes, up slow, up and down.

I am 10 miles from Wibaux. I have seen a man crossing one of those streams on horseback when they were high, taking a horse across, I crossed myself.

Q. Yes, and when you get right above the old channel, the water goes fast doesn't it?

(Testimony of Frank Miesoloski.)

A. Well, the top goes faster and the bottom goes slow. The top goes fast right when you get to the channel. I have swam horses across Beaver Creek when it is high.

Q. You get on the horse and you start in and when you get to the channel, where the channel was you know—before there was any high water—then the water would speed up as you get your horse in? You would be washed downstream a ways, wouldn't you?

A. Yes, sir.

Q. And when you got over the part that was the channel and over water that was over the banks, then it would slow up again? [319]

A. Yes, the edge of the banks not go quite so fast—not so fast close to the bank.

I think maybe I didn't tell you about those trees before at any of these trials; I don't think maybe you asked me, because they are still laying there; anybody can come see; it is there.

This picture looks like some of the hills—I seen hills like that—but I don't know if they are close to my place; I didn't see any like that close to Beaver Creek; I did in the badlands,—I am not in the badlands. Beaver Creek runs in the badlands maybe some places. I am maybe two miles from Duck Creek; Duck Creek flows into Beaver about 2½ miles from my house, that is not south, that is—I suppose that some of this water came up Duck Creek that morning. That doesn't look like

(Testimony of Frank Miesoloski.)

the Duck Creek country; I haven't seen anything like that there (referring to pictures shown to witness).

St. Phillips is a settlement of Polish folks, Russian folks, it is mixed Irish, Dutchmans and Polish and—— I have lived at my present place since 1922; I come into this country in 1909; I moved to that place where the water came down, in 1922.

Q. How often have you tried to swim across Beaver Creek when it was high—out of its banks?

A. I did not swim, but I rode the horse so I get across, seven times—oh, I don't know how many times. I never swim. Where they go across the creek the fences wash out just about every year, but that is just where they cross the creek, main channel, see?

Redirect Examination:

I said that the fences that would go across the main channel of the creek frequently washed out. These fences that washed out in the June, 1929, flood was located on top—top of banks, fields, pasture. I never did have those fences on the top of the bank washed out before.

Whether I recognize any of these pictures, will say that [320] (pointing) is where it used to be my house—right here, and here was it on the top of the divide.

Mr. McCARTHY: Defendant's exhibit D-14 is offered in evidence. I will take the notes off.



(Testimony of Frank Miesoloski.)

Mr. MAURY: Yes, remove the legend. No objection.

The COURT: Very well; it may be received.

Q. The white house shown there in the picture, what is that?

A. That is my house,—no. My old house doesn't show; there is pieces. That is where the house was, right here; and here it was posts left, these posts show, that is right near bridge. There was water up to here, over that; you see that is the foot bridge—suspension bridge. (Counsel using magnifying glass). I spoke of a place, a post where the water was up over, that is right here; that is counting from right to left, the second post.

Q. Now, you speak of the suspension bridge. Will you use the glass?

A. I can see it very well; it is right there, see it?

Mr. MAURY: I would suggest that the witness in testifying about those photographs saying "Here and here", that he get down in front of the jury.

Mr. McCARTHY: I am trying to get them located Mr. Maury.

I see the third post from right to left, then there is a little short post—that would be the fourth post. Now then, the suspension bridge is about half way between the third post and the short post, that is the one that was broken off,—between those trees. Where the suspension bridge was, as to the height of the banks of the creek, one side was

(Testimony of Frank Miesoloski.)

about 18 feet and the other side about 8. That is low, you see,—about 8, more or less.

Q. What is the level ground where post No. 3, right to the left as compared to the banks, of the suspension bridge?

A. I suppose four feet lower at this end.

Q. You think the ground is lower where the post was?

A. Higher. You see, that just about come even with the—— The ground where [321] the third post is I think was about 16 feet above the bottom of the creek. The height of the post I think, above the ground, was about 5 feet. As to where the water was with reference to that post, this here post stick out about three inches, and this one stick out more; I didn't measure it. The second post, right to left, stuck out of the water about three inches; the height of that post above the ground, is about  $4\frac{1}{2}$  feet. Where the second post is, the ground is a little lower than where the third post is—a trifle lower.

Q. What we want to get is how high the top of the post No. 2, right to left, was above the bottom of the creek?

A. I should judge ten inches or——

Q. No; you said the ground here where post No. 3 is, was 16 feet above the bottom of the creek?

A. Yes. As to the height above the bottom of the creek where post No. 2 is, it is probably  $15\frac{1}{2}$  feet. Post No. 2, counting right to left, is about  $4\frac{1}{2}$  feet

(Testimony of Frank Miesoloski.)

high. So, if the water got up on post No. 2 and about three inches stuck out, we would have between 19 and 20 feet of water there.

These (counsel showing other pictuers to witness), are not pictures at my place.

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JOHN EFTA,

called for further cross examination, by Mr. Maury:

I didn't speak yesterday of a cow stable—a barn of some kind—that the water got into—Barn or stable? Which barn or stable?

Q. That you were in and that water got into?

A. I didn't speak of to yesterday. I was the man that testified yesterday, that was at Robert Wicke's; I was there, sure. The water got into the barn or house over there; sure, the water got into all the buildings over there. It was a round barn, silo inside, made out of [322] wood. I should judge the walls was six feet high. The walls were made out of drop-siding; it is regular drop-siding, that is the only way I could describe it; that is the only name; it wasn't made out of planks, it is a regular drop-siding. Drop-siding is six-inch boards and it has got a drop and it has got a groove underneath and it is matched together.

Q. Thin boards?

A. Why don't you listen when I explain? It is drop-siding, got groove, matched underneath under



(Testimony of John Efta.)

the board, and on the top is a groove and cut off, and the boards are matched together to hold the water and the weather.

That wall of water struck that building. It didn't move it any. As to how fast that wall of water was going, I told you yesterday "just as fast as I could jump in the barn". That is pretty hard to tell how many miles an hour it was going. I saw it before it got there; it was 200 feet away, and I just got time to jump in the barn and it was right in the barn.

Q. Oh, it must have been going at least 15 or 20 miles an hour, wasn't it, John?

A. I haven't got no idea at all, how long——

Q. How long it would take that water to come that 200 feet?

A. Yes, sir.

Q. Not over two seconds, was it?

A. I never did time it, how fast I could jump. The barn was not moved off the foundation by that wall of water.

By Mr. McCarthy:

Other buildings there were moved. The house was moved about 15 feet and the granary was moved entirely from the foundation.

W. E. PIERCE,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. Hall).

My name is W. E. Pierce. I live at Butte, Montana. I am [323] district manager for Dun & Bradstreet, Incorporated, formerly R. G. Dun & Company. I have my office in Butte. We have in my office the reports that are made by business houses and merchants in the State of Montana, as to their financial responsibility and assets. I now have with me the reports of the financial standing of Nick Wagner for the years 1928 and 1929. As to the manner of obtaining these reports, we get them in two ways. Immediately after the first of the year, we send blanks to the merchants all over our district, requesting a statement by mail, and we follow that up later in the year with a traveling reporter who calls on those merchants who had not made statements and he requests statements personally.

Q. When the traveling reporter calls, what is the source of information that he relies on——

Mr. MAURY: Objected to as calling for a conclusion. It is impossible for this witness to answer what some traveling reporter relies on.

The COURT: You can show what his instructions are to this reporter.

(Testimony of W. E. Pierce.)

The men are instructed to go directly to the merchant himself and request a statement. The merchant is always asked for a copy of his statement from inventory, and if he hasn't an inventory, then they ask for an estimated statement as close as he can give it. I have those two reports here; I did not take these personally. The man that took those is an employee of our Omaha, Nebraska, office. These statements are signed by Nick Wagner. I, of course, of my own knowledge, do not know whether that is his signature.

Mr. MAURY: Let's see them Mr. Hall. This is for the year 1928?

Mr. HALL: Yes.

Mr. MAURY: Introduce them in evidence. I will look [324] over this one.

Mr. HALL: The question is, will you admit that that is Nick Wagner's signature?

Mr. MAURY: Oh, yes, this is Nick Wagner's signature. I know his signature.

Mr. HALL: We can introduce these with the understanding copies can be substituted later on.

Defendant's exhibit D-15, one of the papers I handed you, was taken September 29th 1928.

(Mr. Hall reading exhibit D-15 to the jury).

Defendant's exhibit D-16 was taken October 5, 1929.

(Mr. Hall reading exhibit D-16 to the jury).

Mr. HALL: We offer both of these in evidence, defendant's exhibits D-15 and D-16.

Mr. MAURY: No objection.



(Testimony of W. E. Pierce.)

Cross Examination:

(By Mr. Maury).

I have never been in Nick Wagner's store in Wibaux myself. I have never seen Nick Wagner before seeing him in court here. The young man that visited him and wrote this statement is still with my company. His name is A. C. Larson. I knew his address for the last six months; I knew how to get him. If counsel had asked me, I could have given him his address down there. They could have taken his deposition any time in the last six months. As to the dates that are meant by those figures on those reports, "10/5/29", that means October 5th 1929. Our young man doubtless put that there as the date that he visited Nick Wagner's store. And this is "9/29/28", that is doubtless September 29th 1928. That showed Nick Wagner's net worth on September 29th, 1928, to be \$28,000.00; and our folks are very careful in considering those things, and particularly, we don't want to overrate a merchant because wholesalers extend credit largely on the [325] strength of our rating, and we don't take the merchant's word for it unless it looks reasonable. Our young men are instructed to look over stocks; they have experience in looking over stocks, and to a certain extent, they get a certain experience and skill in determining what a man is worth and we can tell after a while whether a man is giving us any "guff" or not.

(Testimony of W. E. Pierce.)

Q. And Nick Wagner, probably as close as any mercantile agent and probably as close as he himself, can tell, was in October, 1928, worth \$28,000.00?

A. Well, that was his own opinion, Mr. Maury.

Q. And your young man doubtless found nothing to dispute that?

A. I wouldn't say that. Any well-informed credit man knows that from an estimated statement, it is the human tendency to give himself a little bit the best of it.

Q. Yes, we know that. Yet, he was according to that statement, classed as an honorable, high-class merchant,—statement? Wasn't he?

A. Well, I wouldn't say that; I don't know a thing about it. He owed for his merchandise \$1,297.00. According to his own statement, there was not a dollar overdue. That is his statement,—that he didn't owe anything for merchandise, past due; he had no trade acceptances out; no loans from the bank; no loans from others; and no chattel mortgages; and he didn't owe anything on the purchase price.

Redirect Examination:

Mr. Maury refers to his net assets as \$28,000.00. Of course, that net worth includes his real estate. His merchandise was listed by him there as \$15,000.00, and in the other one his merchandise was listed at \$12,000.00; and in the second statement, he didn't list his store building and lots, as in the first one, at \$5,000.00. I stated that where a man

(Testimony of W. E. Pierce.)

makes an estimate and so forth, that we try to check up, in addition to him,—at the bank—what he owes at the bank, and so forth. As you understand, what we get from him is as reliable a report as we can [326] from him, to furnish to the wholesalers in order to extend credit, and so forth.

Recross Examination:

I don't know how much goods he bought between the October report of 1928, and June 7, 1929. We apparently have no record of how heavily he "loaded up" in the spring of 1929. He didn't request us for a credit rating; he could possibly buy merchandise on his own standing.

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JOE BURKE,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Joe Burke. I live on section 24—14—59, two miles south of Wibaux. I lived on that place since the fall of 1928, and half a mile north from there since the fall of 1924; have lived in the Beaver Valley there since 1924, or I have lived in other parts of the Beaver Valley before that; since the spring of 1911, I have lived lower down in the Beaver Valley. But I have been at my pres-



(Testimony of Joe Burke.)

ent place of residence since 1924. I am living at the same place I was living in 1924 and in June, 1929.

I was at home the night of June 6th and the morning of June 7th 1929. We had a storm around our place, and flood. In the evening, June 6th, I went to bed early, and I don't know what went on in the night—I was a pretty hard sleeper—but along early in the morning I was woke up by a 'phone call along about 4:00 o'clock and they asked me if I knew anything about high water, and I says, "No". They says: "Then you better look around and vacate," and I looked around and I seen the water was getting high, so I dressed and woke up my nephew that was with me—a young boy then—and I says, "Let's go down to the barn." I have a basement-barn which is right on the creek bank, and we got [327] down there and there were six calves tied up in there at the far end, and to go down into it I have a flight of stairs which is about one rod long, and the water was just about up to the barn on the lower side, and I looked up the creek and I seen a big roll of water coming down. I should judge that this roll of water I saw was about four feet high. I couldn't say how wide it was because I didn't take much time to examine it. As to what attracted my attention to this roll of water, I called it,—I looked up the creek to see how much time I would have to work. I knew this roll was coming by the noise—kind of a roar-

(Testimony of Joe Burke.)

ing noise—it was kind of rumbling like. Well, I heard this rumbling and I saw this roll of water four feet high, coming down, then I told Earl, my nephew, I says, “You untie the calves and I will carry them up,” so he took his knife and cut the rope and I started carrying them out. The calves were from a month to maybe two or three months old. I had to carry them up them stairs, about a rod high. The height from the floor of the calf-barn to where I was taking them up was I should judge about seven feet. I started carrying them out and, of course, when I started, I was fresh and I could go about half ways up the stairs and throw them out of the door and let them go, but after I carried out a couple, they kept getting heavier and heavier and by the time I got to the last one, I had water pretty near up to my arm (indicating armpit). Before I started, the barn was dry. It was about two feet away,—up to the door—when I started to carry them. I got the calves all out, then I says to Earl (we looked out and the cows had worked up north on lower ground and I see where that was all going to fill up) and I says, “We better get the cows.” Well, before leaving the site of the calf-barn, ordinarily, from my calf-barn over to low-water in the creek it is about 100 feet. The height of the bank of the creek where the stream is,—well, it gradually works up towards the barn, but I should judge maybe [328] six feet, something like that. The height of the

(Testimony of Joe Burke.)

floor of my calf-barn above the bottom of the creek is about 12 feet—about 12 feet above the level of the creek. As you understand, the ground slopes down from my calf-barn down to the creek. The floor of the calf barn is about 12 feet above the level of the water—about 12 feet above the level of the creek-water in low-water time, and the calf barn on the ground above it, was seven feet. So, I think (I never have measured it, it is just my estimation) that the ground at the top of the calf barn would be about 19 feet above the low-water level of the creek—of the water in the creek.

After I got these calves up on this ground 19 feet approximately, above the low-water level of the creek, my nephew and I went north of the house with reference to the cattle that I spoke of; that is where my cows were; this cow barn is east and a little south from the house and the horse barn is north from the house, just the opposite direction from the house—north; the horse barn is northwest from the cow barn. The cows had went down below the horse barn; that would be still further north than my horse barn was, that is from my house. With reference to being in line,—how they are located—the cow barn is east and a little south,—east about 200 feet; if I ran a line from the calf barn to my house and then another line to my horse barn, and another line from the horse barn to the cowbarn, I would have a triangle there; if I went right north from the cow barn, I would



(Testimony of Joe Burke.)

head right in the creek. The elevation of the ground that my house rests on is about a foot higher than the elevation of the top of the ground at the cow barn. The land down around the horse barn where the cattle were is lower—quite a bit lower. After I got my calves out there, we started to get the cows to bring them back to the granary, which is the highest ground there, and there was no water where the cows were at when we went out, or [329] where we crossed to get them. That is, from this level that the top of the cow barn was, there was no water where the cows was and no water where the horse barn was. We got down to the cattle. It was dry all that time. We just got the cattle started and got back to the horse barn when another roll come up—another roll of water. As to how high that roll of water was,—well, about two and a half feet of water where the horse barn was. I couldn't say how wide that roll of water was because when that roll come over, then it spread a good bit in the field there on the west side,—kind of a flat. The water went across the field I should judge, 40 or 50 rods. Well, we got down there and this roll came along, then most of the cows went into the horse barn and we had to plug them out of there, then they went up by the granary, but we—my nephew and I—got marooned and couldn't get back. We were marooned right west from the horse barn and there was deeper water between us and the house and there was such a current that we couldn't get back. That

(Testimony of Joe Burke.)

current was fast—running water,—very fast. It was running fast enough that it washed the boy down and he grabbed ahold of a post this way and the stream was hard enough that he couldn't hold his feet on the ground. The boy was around 14 years old at the time. He was not so awful big, kind of thin, and not awful heavy. He got ahold of this fence post and the water carried his feet downstream. Then he stayed there, and I was still in the water just a little better than knee-deep and it was all I could do to hold myself up from being washed down, because the current took my feet away from under me, so I had to walk just stiff-legged and hold my bearings. That water was going west; the creek was cutting across then and it was going west from our horse barn. The water was cutting across out of the banks, creek banks, and cutting across making a straight channel.

I recognize defendant's exhibits Q and R. Defendant's Q is a picture of my cow barn and granary and some machinery. That [330] picture was taken from the north; the camera was facing south. The cow barn is below that hay stack. The large building is the granary,—this (indicating). Defendant's R is a picture of the cow barn that I took them calves out of. The man standing there is myself, the boy is my son. That is not the boy I referred to as having been in the water.

Mr. McCARTHY: Is Earl Sawyer here? (Young man stood up). Is this the nephew you spoke of?

(Testimony of Joe Burke.)

A. Yes, sir.

The cow barn door, where I am standing there, that is the bottom door where the water was to when we went down. This is the closest door to the creek.

The COURT: It would be much more informative if you would stand up to the jury there and show them——

Mr. McCARTHY: I now offer them (Q and R) in evidence.

Mr. MAURY: No objection; tear the legend off.

The camera was facing south when this top picture Q was taken. This building to which you are pointing on the extreme right of the exhibit is the granary. The cow barn that I have been talking about, that the calves were in, is right below that hay stack. The house was in further this way, north and west from the granary; that would be right in here (indicating) on the picture. Defendant's R is a picture of the cow barn that I took them calves out of; the door shown there, that is the door closest to the creek. That door that I took the calves out of would be coming up above there on this side—north side. The stair is right about here and it leads right straight out on higher ground above the barn. The door shown in the picture is on the east side of the cow barn; the door out of which I took the calves is located on the west side of the barn.

Some machinery shown in that picture is the machinery that washed away when that second water



(Testimony of Joe Burke.)

come up, that is where the water cut across, it went over that bank and took all that [331] machinery and fences. That machinery consisted of a wagon with a 26-inch box on; sled with a 26-inch box on, and a lot of wood and stuff like that; and water tank, which was full of water, washed out. The wagon and sled—of course, the box left and went further, but the wagon and sled and gears mixed together, didn't go very far—just stayed down in the hole, and I didn't know anything about them, where they was at—until the water went down, and I got them then. The box was washed down about half a mile, and the water tank.

My place is about two and a half miles from Mr. Brophy's; he is south from me. I know where Mr. Massey lives; he lives north from me; he lives nearly two miles north from my place.

Cross Examination:

(By Mr. Colton).

That first roll of water about which I just testified, came I should judge, 15 to 20 minutes after 4:00, or half-past.

Q. That roll of water didn't come up to the cow barn when you and the boy were after the calves?

A. It got into the cowbarn but——

Q. It got into the horse barn?

A. Yes, sir.

The cows weren't in the barn.

(Testimony of Joe Burke.)

Q. I want you to describe the position of the barn where you and the boy brought the calves from, in connection with the banks of the creek?

A. Well, they were right west from the creek.

Q. How was the barn built? Get at it that way.

A. 14——

Q. What did the west wall consist of?

A. The barn——

Q. Where the calves were, what did it consist of? Answer it. (No ans)

Q. Isn't it a fact the barn where the calves were was built right down under the bank of the creek?

A. No, it isn't; the calves were in that barn.

Q. I have asked you twice about the barn where the calves were?

A. The cows——

Q. I am not talking about cows. [332]

The COURT: He doesn't understand you. He thinks you said cows when you said calves.

Q. I want you to describe how the barn where the calves were the morning of the flood, how that is situated with reference to the west bank of the creek?

A. The creek comes from the east——

Q. I want you to answer——

Mr. HALL: Let him go ahead and explain.

A. The creek comes from the east and when it comes down here, it turns and goes north, and right in here is where my cow barn is—where them

(Testimony of Joe Burke.)

calves were—about 100 feet from the creek. Walking along the Beaver, the high land where my house is situated, and the straw stack in that picture, it is not a fact that you can step up on the top,—the roof of that barn; the roof of that barn is about five feet above the ground; the greater part of the barn is under that bench. When I packed the calves up out of there, I had to pack them up six or seven feet up on the ground where my house sets. Immediately south of that barn there is a sort of a precipice,—a fall southeast,—there is a precipice there. In that picture, plaintiff's exhibit 27 (No. 2438, 9/30-33), is my cow barn.

Q. Any objection to this? Step off of the witness stand and explain to the jury where that barn is situated?

A. This is right in the bend of the creek where it comes here from the east and turns in here and goes back north, and here in the barn off in the bend, right in there. South of the barn down here, this is lower ground in here, and back in here it rises; it is a high rise. I don't call this right here a bench. Then the height of that raise above the level of the ground where the barn is down there, is 10 feet. It is a fact that when I looked south when I went down after those calves, that the water was coming over that bench, but the lower place was also filled. It wasn't over that bench where I saw that water coming; that roll of water [333] was coming down the creek; it was just in



(Testimony of Joe Burke.)

the creek and out a ways. It could get out a ways without going out over the bench, because that bench don't start right at the creek; it starts maybe 15 rods or so back from the creek. I don't know how wide that first roll of water was that was coming down there at 20 past 4:00 that morning. It entered in the cow yard,—not up above. That roll of water was confined within the banks, high banks of the creek at my place; that first roll of water did not come up where the house, horse barn or granary was. I never looked to see how much below the banks of the creek that first roll of water came; I don't know, I didn't see it—what I was watching out for was myself and stock,—I didn't have time; it was confined within the high banks of the creek.

I testified at two or three former trials. I don't know but what I have testified about a second roll of water before,—I wouldn't say but what I have.

Q. I will refresh your recollection of a case two and a half years ago, Heckaman vs. Northern Pacific, a case arising out of the same flood, and ask you to refresh your recollection (pages 782-783, Vol. 2, printed Transcript on Appeal, M. C. Heckaman vs. Northern Pacific Railway Company).

A. This is all right, but that shows you there about the second raise.

Q. I am asking you if you say there was a second roll of water?

A. That shows it.

(Testimony of Joe Burke.)

Q. Then you say there was a second raise, but not a second wall?

A. Well, you could call it that way.

Q. It was a second raise? I will show you this part here.

The COURT: Let him read it to the jury.

“This roll of water that I saw coming, whether it struck the barn, it was while I was taking out the calves. Whilst I was taking out the calves, it come up, you see, pretty near under my arms—I should judge about four feet. The water then continued [334] to rise, I couldn’t say for how long, because when they were taken out we vacated. The water washed out about one mile of my fence; it tore up one of my barns; washed out some crop.”

At that trial maybe you didn’t ask me about a second roll or raise of water.

Q. You said the water continued to raise, and that is what happened, isn’t it? (No ans.)

Q. We never called you as a witness, did we?

A. No, sir.

Q. Now, this place where you got marooned,—between the other barn and the house, that is sort of a low swale?

A. There is sort of a low swale between the house and the barn. The cause of our being marooned there is result of that low swale,—there was no water when we went out, but before we could get back

(Testimony of Joe Burke.)

with the cows, that water was running through the swale between the house and the barn. We was where we couldn't get out. One of the neighbor boys come up with a saddle horse and rescued us—took Earl first and then me. Shortly after he rescued us we vacated. We went to Ed. Parker's from there—went half a mile north and half a mile west. It is on the same valley level as Beaver Creek where we went, about the same bench the house is on. There was no water in my house in 1929. After we were rescued we went out on a saddle horse to Ed. Parker's. As to the depth of the water over the flats, the deepest place south of my garden, was kind of a swale and about belly-deep to a horse, and it was all we could do to get through. The average along the valley level going along there to Parker's, was maybe a foot or a foot and a half of water until we got into that low place. When we got into the swales there was lots of current; around the house there wasn't. As we went up the road there was plenty of current; the deepest was belly-deep to a horse on an average.

As to how long the water stood around the bench there on the morning of June 7, 1929, will state it was gone when I come back. [335] I don't know exactly what time I come back, but if I remember right, it was sometime before noon. The water was mostly all off the flats then, it was back down into the high banks; there was no water up above. My nephew, that held onto the post, was around 14 years old at that time I think.



(Testimony of Joe Burke.)

Redirect Examination:

Q. You spoke of being rescued. Just how was that rescue effected?

A. By a saddle horse. When I looked out and seen Gene Parker coming with a saddle horse, I felt pretty good.

Mr. MAURY: We move to strike out, "I felt pretty good." That is non-sensical.

The COURT: All right.

He came down there on a saddle horse. He was a young man. When I seen him coming, there was a hay stack coming towards me, and I walked up on dry footing and the hay stack stayed there and I stayed on it, and when Gene come, I asked him to get Earl first and then come back and get me, which he did. It was all the horse could do to go through that water. It was a swift current that was bothering the horse. When we left our place and went to the neighbors, we went by horse; you couldn't get by with an automobile. There was water around the vicinity of my house when we left or vacated—not very deep and not very live water. It come fairly close all around the house, within a few feet. By "fairly close" I mean it went in maybe two or three feet maybe, some places, close, and some places a little further. Roughly speaking, the house was surrounded by water and it got within two or three feet of the house. As to the condition of the road the water went quite a ways, from a few inches to belly-deep on a horse, and plenty of current.

(Testimony of Joe Burke.)

Recross Examination:

I don't know whether my house is on the same bench with Mr. Massey's, I couldn't say; I don't know if it is on the same [336] bench as Clem Parker's. I don't know if any water got in Clem Parker's house, I wasn't up there.

I saw this first roll of water coming before I started taking the calves out. It took me approximately 15 minutes to get the calves out; I was working fast. How far the roll of water was away when I started taking the calves out is hard to answer; I should judge 50 rods or some such a matter, I don't know just how far it was. I can guess how wide the banks are at that barn—between high-bank and high-bank; an estimate is between four to six rods between the banks of the creek.

Redirect Examination:

When I speak of the banks being so-many rods across, I refer to the high bank.

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TOM RUSH,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Tom Rush. I live 18 miles south and west of Wibaux. I formerly lived in close to Wi-